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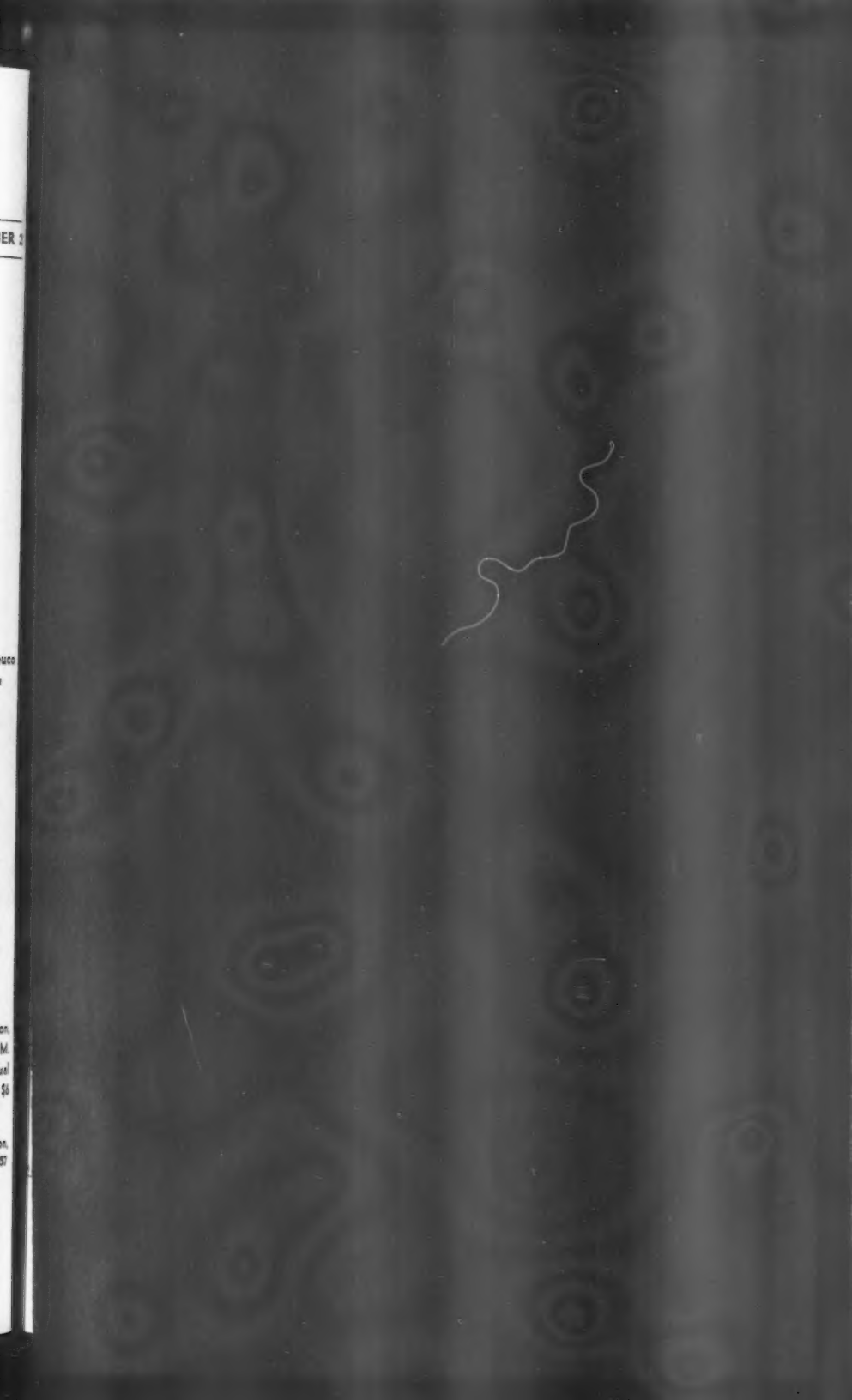

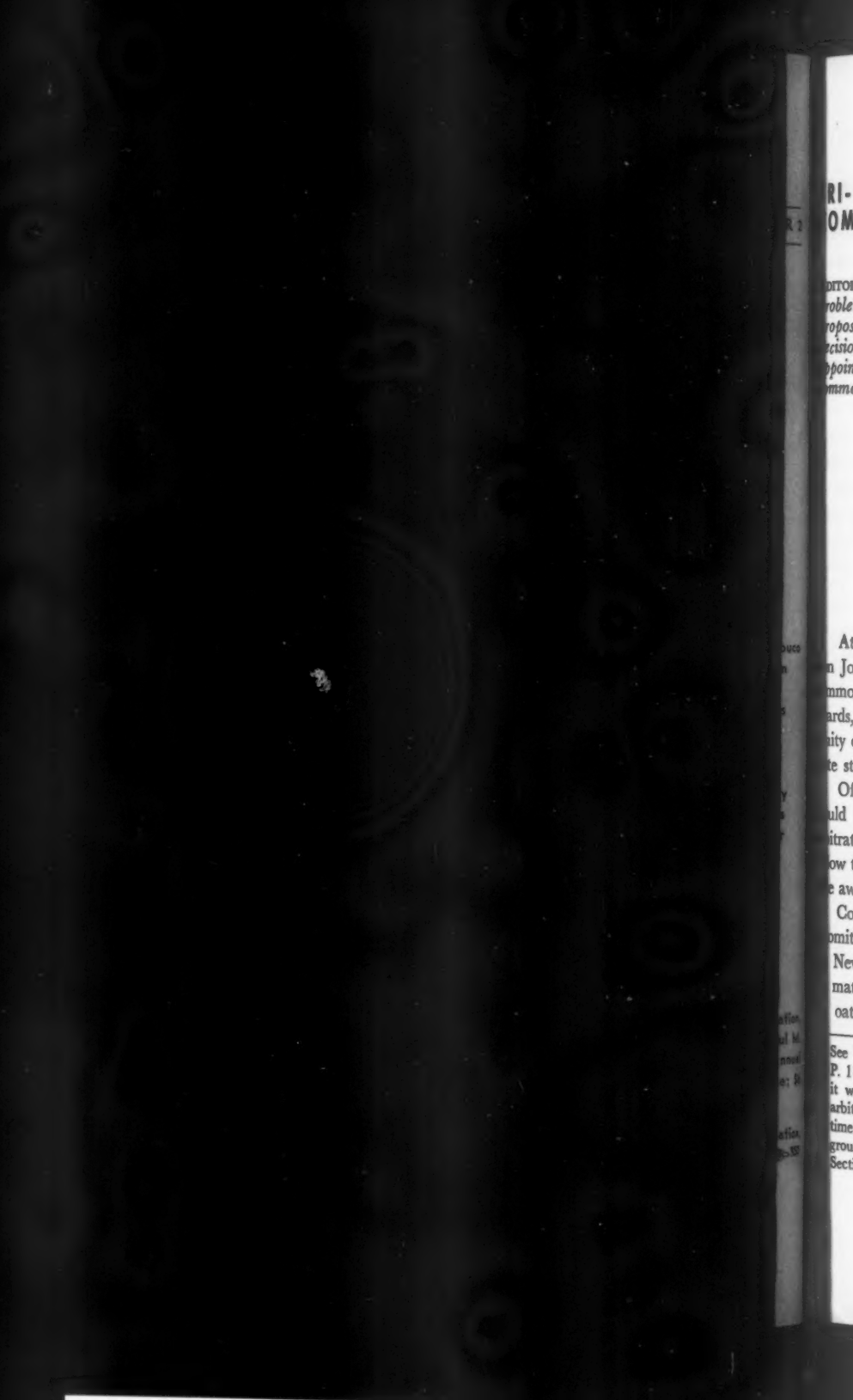

RI-PARTITE ARBITRATION: OMMENT FROM READERS

DITOR'S NOTE: *Two issues ago, we introduced for discussion the roblem of the tri-partite arbitration board and put forward several roposals for protecting the arbitration system from adverse court ecisions that occasionally result from un-neutral conduct of party-ppointed arbitrators. We reprint below five letters from readers mmenting on that editorial.*

Marion Beatty
Attorney and Arbitrator

At the conclusion of your editorial in the last issue of Arbitra- n Journal, you invited readers to contribute their thoughts on the mmon practice of appointing arbitrators on tripartite arbitration ards, one by the company and one by the union, and the incon- ity of administering to them an oath as may be required by a few e statutes, an oath implying impartiality.

Of course, the common law does not require an oath and it uld be only in those few states where the statute requires an itrator's oath and only in those cases where the parties desired to ow the statutory procedure in order to obtain a statutorily enforce- e award that the problem could arise.

Courts have held that parties may waive the oath by agreeing mit it or by proceeding without objection to the omission,[1] and New York statute,[2] for example, specifically so provides. Where matter is dealt with openly and both sides agree to dispense with oath by the partisan arbitrators, I believe most courts would

[1] See Rickman v. White, 266 SW 997 (Mo. 1924); Hopper v. Fromm, 141 P. 175 (Kansas 1914). In Cassara v. Wofford, 55 So. 2d 102 (Fla. 1951) it was held that an objection to an award on the ground that the arbitrators were not sworn, as required by statute, made for the first time after the award was rendered, was untimely and not sufficient ground for setting the award aside.

[2] Section 1455 NY Civil Practice Act.

recognize the rights of the parties to agree upon this mutually desi able procedure. The whole process of arbitration is a system f settling controversies by a mutually agreed on procedure and th common law has long recognized freedom of the parties to contra in this manner.

Where the problem of non-neutrals is faced realistically, th parties often stipulate that their right to have a representative o the board is waived and that the neutral arbitrator shall act as so arbitrator and make the final and binding decision. For convenienc let us refer to this as Stipulation "A".

A slight variation of this is the stipulation that in case of di agreement, the award of the neutral arbitrator shall control an that it shall be final and binding. Let us refer to this as Stipulatio "B". Both practices are common and were referred to in your article

Where each of the parties appoints board members to participat in the decision, each casting a predictable vote, aren't they in reali waiving the historical and legal requirement of neutrality?[3]

(*Continued on Page* 92)

3. In the case of Petition of Dover S.S. Co., 143 F. Supp. 738 (U Dist. Ct., S.D. New York, July, 1956) it was recognized that party appointed arbitrators may not be compeltely disinterested, but held th the situation is a generally accepted practice and not objectionable.

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SENIORITY RIGHTS AND TRIAL PERIODS

by Wayne E. Howard

The application of labor agreement provisions qualifying seniority rights in terms of skill and ability is fraught with difficulty. Several important questions arise: how much consideration should be given ability under various clauses and in various work situations; on what ground may a company's determination of ability be reviewed in the grievance procedure; what are the proper criteria for determining ability in individual work situations? These questions have been explored by the writer in previous issues of the *Arbitration Journal*.[1] One additional problem area warrants some consideration, namely, the use of the trial period as a device to demonstrate ability.

The increasing use of the trial period as a tool of ability measurement has stemmed from the disenchantment of companies, unions, and arbitrators alike with attempts to apply other ability criteria. Attention has been focused on a simple and objective test which directly relates worker ability to job requirements. One such test is the trial period. Based on the concept that job performance is the best proof of ability, it seeks to measure an employee's abilities in carrying out the duties of work different from that on which he had previously been employed, where such change has resulted from an application of the promotion or layoff provisions of the contract. Accordingly, the employee is permitted a period of time which may vary from a matter of minutes up to three months to prove that he possesses the ability to handle the new work assignment.

One basic purpose then of the trial period is to get away from subjective estimates of ability, and to substitute an objective test of observed performance. A second purpose of the trial period is to familiarize the employee with the requirements of the job. A man may have the ability to perform the job, indeed he may have per-

1. See "Interpretation of Ability by Arbitrators," Volume 14, No. 3, 1959; "Determination of Ability," Volume 12, No. 1, 1957; "Criteria of Ability," Volume 13, No. 4, 1958.

formed it previously, but equipment, layout, and procedures are dynamic and a break-in period is required so that he may become acclimated to the changed environment. Thirdly, the trial period may be used to resolve reasonable doubt concerning an employee's ability in cases where other criteria which have been applied were unable to resolve the issue. In such cases it is used as the final standard of ability only after the application of other criteria have determined that there are grounds for believing the employee has the requisite ability.

Arbitrators have been very careful to distinguish between a trial period and a training period. Under the concept of a trial period, the employee presumably has already acquired ability and is merely given a period of time to effectuate such ability through familiarity with the job; it is not a period wherein the worker may seek to gain training in the sense of acquiring ability to perform the duties of the job.[2] Others have emphasized that the trial period stresses present performance, rather than potential ability.[3] Recently some arbitrators have developed the concept of a demonstration period which they distinguished from the trial period in terms of its extremely short duration wherein the worker requires only to be shown what and where the work is, the worker being then instantly ready to do it adequately.[4] Both the trial period and the more restrictive demonstration period have been regarded as tools for ability measurement rather than procedures under which management is obligated to train employees in order that they may exercise their seniority rights unhampered by ability qualifications.

Contractual Provisions

Some collective bargaining agreements specifically provide for a trial period as the final criterion on which ability is to be measured, as the following examples illustrate:

2. In re Shore Metal Products Co. (1955) 24 LA 437; American Lava Corp. (1955) 24 LA 517; Linde Air Products Co. (1955) 25 LA 369; Great Altantic and Pacific Tea Co. (1957) 28 LA 733; U.S. Pipe and Foundry Co. (1958) 30 LA 598.
3. In re International Harvester Co. (1950) 15 LA 587; Illinois Malleable Iron Co. (1951) 16 LA 909; Wagner Electric Corp. (1953) 20 LA 768; Great Atlantic and Pacific Tea Co. (1957) 28 LA 733.
4. In re Virginia-Carolina Chemical Corp. (1955) 24 LA 461; Great Atlantic and Pacific Tea Co. (1957) 28 LA 733; Allentown Portland Cement Co. (1958) 31 LA 476.

When an employee bids in a job or exercises his bumping rights and there is a question of his ability, he will be allowed a reasonable length of time up to fifteen (15) days to establish his fitness and ability to perform the new duties to which he is assigned, which shall include up to five (5) days breaking in period if deemed necessary.[5]

Wherever there is question whether or not any employee is qualified said employee shall be given an opportunity to prove the qualifications on the job over a reasonable length of time.[6]

ther labor agreements achieve the same purpose by defining the rms "capability" and "competency" in terms of a trial period:

For this purpose the longer service employee will be deemed capable of doing the work of the shorter service employee if the longer service employee does not require more than a 40 hour break-in period.[7]

Competency shall be construed as:

1. The necessary mental and physical qualifications to do the job satisfactorily.
2. The necessary training and experience to perform the essential duties of the job either immediately or after a brief breaking-in period (1 or 2 weeks) at the new job.[8]

nother variation of contractual provision seemingly relegates the ial period to a position secondary to other criteria, and provides at once the employer has made the selection of an employee, presumly upon other criteria, the employee is given an opportunity to ove his ability within a probationary period. Examples of such uses are:

An employee so selected to fill a vacancy shall be given a trial period not to exceed 30 days in which to prove his ability, it being expressly understood the Company retains the right to remove him therefrom at any time he proves he is incompetent or when the Company and the Workmen's Committee deem such

5. Columbian Carbon Co. and Oil Workers International Union, Local 463 (CIO) (1949).
6. Seeger Refrigerator Co. and Federal Labor Union, Refrigerator Workers Local 20459 (AFL), 1951.
7. International Harvester Co. and United Automobile, Aircraft, and Agricultural Implement Workers of America, Local 305 (CIO), 1953.
8. Beaunit Mills, Inc. and International Brotherhood of Electrical Workers, Local 136 (AFL), 1950.

a trial period imprudent and hazardous to the operations of the Company.[9]

Employees assigned to vacancies or new positions will be given a reasonable opportunity to demonstrate their qualifications to fill such vacancies or positions.[10]

In the latter instances the trial period seems to serve more as a protection against premature demotion for lack of ability than as a tool for measuring ability.

Trial Periods Imposed by Arbitrators

Even in the absence of specific contractual authority, however, many arbitrators have imposed on the employer the general obligation to settle disputes over alleged ability by means of a trial period. While the imposition of such an obligation is dependent upon the facts of each individual case, it seems related to several underlying factors in each situation, namely, the degree of seniority afforded by the labor contract, the nature of the job, and the inability of other criteria to resolve the issue of ability.

Where the collective bargaining agreement provides that seniority shall predominate in promotions or layoffs, with a mere sufficiency of ability required by the senior candidate, arbitrators are more likely to require the employer to give such candidate a trial period to determine whether he has the necessary ability. Under such contract language, the senior employee is entitled to job preference subject only to a question of his ability. Some arbitrators feel that the strong weight given to seniority in such contracts makes it necessary for the company to give equally strong proof that the senior employee did not possess the required ability. A trial period provides such strong proof.[11] One arbitrator was so impressed by the need for

9. American Republics Corp. and Oil Workers International Union, Local 592 (CIO), 1951.

10. Dairyland Power Co-Operative and International Brotherhood of Electrical Workers, Local 953 (AFL), 1948. In interpreting this provision the arbitrator ruled that the determination of qualifications (on other grounds) by the employer when honestly arrived at is final and binding on the parties, and that a trial period is not a right of any employee, but only those deemed by the employer to have the necessary qualifications.

11. In re Tin Processing Corp. (1951) 17 LA 193; U.S. Slicing Machine Co. (1954) 22 LA 53; Rome Grader Corp. (1953) 22 LA 167; Colonial Products Refining Co. (1955) 25 LA 130; Dana Corp. (1956) 27 LA 20; Gorton-Pew Fisheries Co. Ltd. (1956) 27 LA 796. See also in re Great Atlantic and Pacific Tea Co. (1957) 28 LA 733 where a strongly worded ability clause was used partly as justification for denying a trial period.

trial periods to disqualify employees, where primary emphasis is placed on seniority in the filling of job vacancies, that he required a trial period be given an employee who had failed one just six weeks before.[12] Such an extreme point of view, however, has not been generally followed.

When the nature of the job to be filled is one of critical importance from the standpoint of safety or where the job is of strategic importance in maintaining high production or high quality requirements, trial periods are not likely to be required. Since the imposition of a trial period may necessitate the employer to entrust certain operations to an employee who later proves to be unqualified, arbitrators are loath to take such a responsibility where the failure of the employee may result in costly or dangerous operations.[13] On the other hand, where there is no danger inherent in a job or where the job is simple, arbitrators have ruled that the employer's obligation to give a trial period is more pressing.[14]

Perhaps the most important factor affecting the decision of an arbitrator to impose a trial period is the extent to which other criteria have clarified the question of whether a given employee has the necessary ability. In almost every case studied where an arbitrator did not require a trial period, the application of other ability criteria had resolved the issue to the point where a trial period would be superfluous.[15] Further, in each case where an arbitrator imposed a trial period in the absence of contractual requirements, it was made clear that management was unable to resolve the issue to the satisfaction of the arbitrator by the use of other criteria.[16] In

12. In re Gondert and Lunesch, Inc. (1949) 11 LA 1079.
13. In re Emmons Loom Harness Co. (1948) 11 LA 409; Autocar Co. (1952) 18 LA 300; Coca Cola Bottling Co. (1952) 18 LA 757; Day and Zimmerman, Inc. (1956) 27 LA 348; White Motor Co. (1957) 28 LA 823; Marathon Electric Manufacturing Corp. (1958) 31 LA 656.
14. In re Seeger Refrigerator Co. (1951) 16 LA 525; Rome Grader Corp. (1953) 22 LA 167; Virginia-Carolina Chemical Corp. (1955) 24 LA 461.
15. In re Emmons Loom Harness Co. (1948) 11 LA 409; United Rayon Mills (1950) 14 LA 241; Autocar Co. (1952) 18 LA 300; Wagner Electric Corp. (1953) 20 LA 768; Shore Metal Products Co. (1955) 24 LA 437; Curtis Companies, Inc. (1957) 29 LA 50.
16. Public Service Electric and Gas Co. (1949) 12 LA 317; Seagrave Corp. (1951) 16 LA 410; Tin Processing Corp. (1951) 17 LA 193; Nickles Bakery, Inc. (1951) 17 LA 486; Lukens Steel Co. (1951) 18 LA 41; Rome Grader Corp. (1953) 22 LA 167; Corn Products Refining Co. (1955) 25 LA 130; Linde Air Products Co. (1955) 25 LA 369; Gorton-Pew Fisheries Co., Ltd. (1956) 27 LA 796; Vulcan Mold & Iron Co. (1957) 29 LA 743; Allentown Portland Cement Co. (1958) 31 LA 476.

each of these cases the arbitrator banished his own doubts by imposing a trial period to determine the issue of ability.

Who Is Entitled to a Trial Period?

The fact that the labor agreement contains specific contract clauses providing for trial periods as means of establishing the ability qualification does not guarantee senior employees the right to a trial. A bona fide dispute over capability must exist. There must be reasonable grounds for believing that the employee has the ability. There is no compulsion to provide a trial period where the job patently cannot be handled by the employee in question.[17] The requirement of reasonable doubt and bona fide dispute over ability has also been used where there is no contractual provision for trial periods, but where the arbitrator has seen fit to impose them as criteria for determining disputed ability.[18]

What Constitutes a Fair Trial?

The problem of what constitutes a fair trial period is concerned principally with two interrelated issues: the length of the trial period and the circumstances under which the employee is required to demonstrate his qualifications and ability. The trial period must be long enough to afford the employee a reasonable period of time to demonstrate his qualifications. This period is related to the complexity of the job requirements and the degree of skill necessary, rather than to some arbitrary length of time.[19] Even where the contract provides a stated trial period, the employer may freely cancel

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The one exception to this policy was in re Gondert and Lunesch (1940) 11 LA 1079 where the arbitrator required a trial in the face of convincing evidence that the employee could not succeed.

17. In re International Harvester Co. (1950) 14 LA 470; International Harvester Co. (1953) 21 LA 231; International Harvester Co. (1955) 24 LA 79; Day and Zimmerman, Inc. (1956) 27 LA 348; White Motor Co. (1957) 28 LA 823; Marathon Electric Manufacturing Co. (1958) 31 LA 656.
18. In re Rome Grader Corp. (1953) 22 LA 167; Linde Air Products Co. (1955) 25 LA 369.
19. In re United States Slicing Machine Co. (1954) 22 LA 53; American Republic Corp. (1951) 16 LA 454; Seeger Refrigerator Co. (1951) 16 LA 525. See also in re Copco Steel and Engineering Co. (1949) 12 LA 6 wherein a trial period of two hours was considered unreasonable; Plastic Jewel Co., Inc. (1950) 14 LA 775 wherein a three day trial period was considered reasonable; Rome Grader Corp. (1953) 22 LA 167 wherein a fifteen minute test was ruled unfair.

such a trial whenever it becomes apparent that the worker does not have the ability. It has been held that under these circumstances a fair trial is independent of contract stipulations. As Professor John R. Abersold pointed out in one case:

> The Arbitrator, however, cannot go along with the Union's contention that every employee whose qualifications or ability are questioned by the Company shall be entitled to a seven-day trial period. The amount of the trial period will depend on the nature of the job and on the circumstances under which the employee is required to demonstrate his qualifications and ability.[20]

On occasion, arbitrators have also extended trial periods when management has been unable to formulate, or where supervisors were divided on, an opinion of employee ability.[21]

Mere length of the trial period, however, does not insure that standards of fairness have been met and arbitrators have also examined the conditions under which the trial was carried out. Two important factors which have been looked into are the instructions which were given the worker and the general assistance which was offered him in his attempt to familiarize himself with the job requirements. Where instructions and assistance were lacking, or where they were given in greater measure to one employee than to another, arbitrators have tended to rule that the trial period was unfair.[22] The standards by which management evaluates the employee on trial must be those applied by supervisors to the previous holders of such jobs under actual day-to-day operations. The trial period is neither a device for raising standards nor for lowering them. Where arbitrators have found the performance standards in the trial period to be higher than those management expected of current employees, they have ruled that such a trial period was unfair.[23]

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20. John R. Abersold, unpublished arbitration opinion, 1952. See also in re Hayes Manufacturing Corp. (1950) 14 LA 970 wherein the action of the employer in dropping an employee, after three hours of a contractually provided three day trial period was upheld; White Motor Co. (1956) 26 LA 877; Mengel Co. (1956) 27 LA 722.
21. In re Lukens Steel Co. (1951) 18 LA 41.
22. In re Fitzgerald Mills Corp. (1949) 13 LA 418; United States Steel Corp. (1953) 20 LA 743; White Motor Co. (1956) 26 LA 877.
23. In re Fitzgerald Miills Corp. (1949) 13 LA 418; International Harvester Co. (1950) 15 LA 587; Dayton Malleable Iron Co. (1953) 20 LA 572; Bell Aircraft Co. (1955) 25 LA 618.

Employee's Rights After Failure to Qualify

Another problem is the plight of the worker who fails to qualify on the trial period. This problem is much more serious in the application of the layoff provisions which permit bumping rights. Where the trial period is utilized in promotion, invariably the contract or past practice protects the candidate in cases where he fails to qualify by allowing him to return to his previous job. A typical provision, for instance, reads:

> If the employee is found unable to perform the assignment, he will be transferred to his previous occupation and labor grade at his previous rate.

In the case of layoff, however, no previous job is currently in existence, and in the absence of clear contract terminology arbitrators are not in firm agreement as to the employee's future rights. One group of arbitrators has ruled that failure to qualify during a trial period cancels the seniority privileges of bumping into other jobs, since discharge from the trial job is not because of layoff, but lack of ability. Thus, the employee holds only seniority rights in recall, not further bumping privileges.[24] Another arbitrator reaches the same conclusion, but for the more practical reason that to allow further bumping privileges would be unsettling to the operations of the company and to the junior employees still employed.[25] One arbitrator, however, reached an opposite conclusion that an employee on failing a trial for a given job has the right to bump into the next lower job.[26]

Because of the serious consequences which may result during a reduction in force where an employee fails on a trial, arbitrators have carefully examined the bumping procedure to determine whether the company was negligent in the choice of jobs upon which an employee was allowed a trial. In one instance where the company was fully aware that an employee could not make the grade and yet failed to inform him of this fact, but permitted him to try out and fail, the arbitrator awarded the employee back pay from the time of his layoff and a new choice of bumping opportunities.[27] It has also been held that the failure of an employee upon a trial will not extinguish his bumping rights where the employer has failed to inform

24. In re International Harvester Co. (1950) 14 LA 467.
25. In re United States Slicing Machine Co. (1954) 22 LA 53.
26. In re Nickles Bakery, Inc. (1951) 17 LA 486.
27. In re Autocar Co. (1952) 18 LA 300.

the employee of all the jobs he could have chosen. Despite the failure to qualify, arbitrators have ruled that the employee's bumping rights were violated from the outset and a new choice has been allowed.[28]

Advantages of the Trial Period as a Criterion of Ability

The trial period is a useful device for determining the ability of employees to perfom jobs requiring qualifications which differ from those on which they are currently employed. Judged by the characteristics of effective criteria of ability, the trial period ranks high among alternative methods of evaluation.[29] Indeed, where the problem is one of measuring ability against new job requirements, no other criterion possesses to as great a degree the desired characteristics of effective standards of measurement. The trial period is objective and possesses functional fitness to a high degree. By matching the employee's ability directly against the requirements of the job, a realistic evaluation of job performance can be obtained. Furthermore, the trial period is simple to apply and is easily understood as a standard of evaluation, a fact which gives it a ready acceptance on the part of all parties concerned.

The Problem of Inefficient Operation During the Trial Period

The chief weakness of too widespread a use of the trial period as a criterion of determining ability lies in the risks inherent in having untried employees attempting to prove their ability on critical jobs. To provide promotions, job vacancies, or bumping rights to a senior candidate subject only to the qualification that he prove his capability during a trial period, may result in many operations being performed by employees who prove incompetent during the course of the trial. While such incompetence may be clearly indicated to them, in a manner impossible to achieve under other criteria, the costs to the company of such incompetence may be staggering, and the possible threat to the safety of other employees may be very real.

That arbitrators have recognized this danger is very clear from an analysis of their decisions on the trial period. Even where the parties, themselves, have provided for trial periods as criteria for the measurement of ability in the collective bargaining agreement, in

28. In re International Harvester Co. (1950) 14 LA 467; United States Slicing Machine Co. (1954) 22 LA 53.

29. For a development of characteristics of effective ability criteria see "Criteria of Ability," *Arbitration Journal*, Vol. 13, No. 4, 1958.

their interpretation of those provisions, arbitrators have tended to minimize the problems resulting from the employment of personnel in jobs for which they are unqualified. The major safeguards imposed by arbitrators have been:

1. The careful distinction between a trial period and a training period.
2. The refusal to order a trial period in certain critical jobs.
3. The requirement that a job candidate must possess sufficient ability to warrant a trial.
4. The right of management to cancel the trial wherever the job candidate demonstrates his incompetence.
5. The termination of bumping rights for employees who fail to qualify during the trial period.

While there has not been complete unanimity among arbitrators on these safeguards, each seems to represent the weight of opinion on that particular issue.

A careful distinction between a trial period and a training period serves to prevent an untrained employee from exercising his seniority rights to claim jobs which he obviously has neither the experience nor competence to perform. During a training period emphasis is placed upon requisite ability upon completion of the program, but in the trial period importance should be placed upon ability at the beginning of the period. This is necessary lest the trial period lose its purpose as a criterion for measuring ability, and become, instead, an automatic training opportunity for senior employees. This does not mean that senior employees should not be given training, but merely that trial periods are not the proper media for that purpose. Indeed they are often an inefficient training device for several reasons. First, they are inextricably bound to the seniority principle. As a device to measure ability in conjunction with seniority for the placement of personnel, the selection of trainees is biased in the direction of company service, and other qualifications which would improve the selection of trainees are often not considered. Secondly, the training frequently lacks organization or competent instruction. Since a trial period was not intended to train, the assignment of a given employee to a trial period is rarely accompanied by organized instruction, but the employee is left to find out, as best he can, how such a job should be performed. Thirdly, the trial period most often comes into play at a time when training is usually unneeded or not desirable, namely during a decrease of forces. Obviously it is wasteful from a

training standpoint, as well as costly, to undertake training for positions which are already overmanned. While the protection of the senior employee is desirable during periods of economic stress, it should be confined to giving him the fullest opportunity to use his present skills, and not extended to force management to undertake expensive and wasteful training.

The critical job poses a special problem. How can it be precisely defined? If the arbitrator holds too embracing a view of critical jobs and refuses to take issue with management's determination of ability, there is the danger that the contractual seniority rights can be whittled away by arbitrary determination of ability on the part of the employer. If, on the other hand, the arbitrator entertains too limited a view of critical jobs and requires a trial period to settle the issue on almost any job, there is the risk that excessive costs and even unsafe operation of company equipment may result. The issue is made no easier by the pressure of the parties in the dispute. To management, every job is critical; to the union, no job is beyond the pale of proof through the use of the trial period. The arbitrator cannot resolve this issue except through exercising judgment with respect to each job in question. He must attempt to draw a balance between the dangers of the inadequate measurement of ability through other criteria against the latent risks involved in determining the ability of the employee through the trial period.

The requirements that a candidate must possess sufficient ability to warrant a trial period and that he must throughout the trial period evidence enough ability to be retained on trial are sound. Not only are such requirements essential in order to minimize the danger of incompetent operation of company equipment, but indispensable to the preservation of the real nature of trial periods. For trial periods are criteria, measurements, yardsticks for determining ability. It is senseless to measure what is already obvious, and where patently unqualified employees are permitted to have the benefit of a trial period, the trial period loses all meaning as a criterion of determining ability. Where a senior employee under the bumping provisions is allowed a trial on whatever job he chooses, and, regardless of the ability evidenced during the trial period, is maintained on that job for the full contractual period, then the trial period becomes in effect a psuedo-dismissal wage. Likewise if such a condition is permitted when promotional opportunities open up, trial periods become less a criterion for determining ability and more a salary bonus which

must be paid the senior employee, e.g., his increased wage for the trial period, for his own inability to advance beyond his current job.

If the granting of trial periods to every senior employee is to be avoided and the problems of incompetent operation are to be minimized, it is necessary to develop other criteria of ability. While these criteria need not possess the same degree of reliability for purposes of evaluation, they must be sufficient to screen out candidates whose ability is obviously below that necessary to undertake the performance of the job for which they have requested a trial. Unless attention is focussed on preliminary screening of job candidates, the trial period may be too costly to undertake, regardless of its value as a reliable and acceptable criterion. Its greatest value, therefore, lies in cases where the use of other criteria has not resolved the issue or there is an honest difference of opinion as to the ability possessed by the candidate.

The termination of bumping rights for employees who fail to qualify during a trial period is another important safeguard for preventing the trial period from becoming a vehicle for inefficient operation and personal gain. In this connection, it is necessary to distinguish clearly between trial periods used to fill company vacancies and those applied when economic conditions require a reduction in force. In the former situation, where the employee is transferred for company convenience, or where he is attempting to develop his skills for maximum advancement within the hierarchy of jobs, there seems little question that protection in his former job is but a matter of simple justice. But where economic conditions cause his old job to disappear, he can retain his employment only at the expense of some fellow worker. Under these conditions, the justice of his claim must be balanced against the rights of the employer and his fellow employees. The employer, in times of economic stress more than at any other time, has the right to expect competent operation of company processes. The junior employee has the right to feel secure in his job knowledge as well as in his company service.

The knowledge that failure to qualify means layoff is a leavening influence in such situations to prevent outrageous claims on jobs by senior employees. The senior employee is likely to assess his ability in more realistic terms, and to limit the application of his bumping rights to jobs on which he has had previous experience or to those which he feels reasonably sure he can perform competently. As a result, the employer is more nearly assured of competent operation

during such a period, although there may be considerable turnover of employees on particular jobs. The junior employee also possesses more job security, and feels that his competence and ability are in part rewarded. It removes the frustration which can result when the junior is required to yield his job to an obviously incompetent senior. For even though the senior does not qualify, in the absence of safeguards he could displace the junior employee for the term of the trial period. Moreover, if termination of bumping rights is not provided, the senior employee could bid on a series of jobs, and in the event of failure to qualify continue this procedure indefinitely.

The imposition of these safeguards by arbitrators has increased the value of the trial period as a means of evaluating ability, and has, in addition, introduced a flexibility into its use that contract terminology cannot easily convey. But putting the emphasis on the fundamental purpose of the trial period, e.g., to measure ability, rather than on some arbitrary length of the trial period as negotiated by the parties, the arbitrator has reduced the rigidity of contract clauses. In this way the trial period may be applied more successfully over a wider range of jobs.

The Problem of Assuring a Fair Trial

Another problem which exists in the use of the trial period to measure ability is the assurance that the conditions under which the trial is taken are such as to give the job candidate a fair opportunity to demonstrate his ability. The importance of this factor cannot be overstressed. A biased trial is no measure of ability. Furthermore, if trial periods are restricted to those employees whose ability is honestly in doubt and penalties are assessed for employees who fail to qualify during the trial, the job candidate has every right to demand that his efforts to demonstrate his ability be furthered by every assistance and encouragement the employer has at his disposal. Without wholehearted assistance, the employee on trial is endangered with loss of seniority rights and insecurity of job tenure.

This problem is particularly difficult to solve because it is one which cannot be resolved by negotiators or arbitrators. It does not represent a conflict of issues between the company and the union. Rather its roots are sunk in the area of social pressures surrounding the foreman and the work group. It is occasioned by the sometimes irrational defense mechanisms erected by a working team to any outside force which threatens the survival of the group. The employee

exercising his bumping rights is such a threat. At this point the issue is not one of seniority versus ability, but which employee gets the available job. The bumping employee is met with antagonism from the start. He is an intruder in the social framework. His presence causes a loss to one of the members of the group. In addition, until he familiarizes himself with the particular job, his output will likely be poorer than that of the displaced employee, resulting in extra effort on the part of others in the group or causing group output to fall. The foreman may resent losing a capable employee and may chafe under the necessity of devoting additional time to instructing a new man. Where financial incentives are involved, the threat of pecuniary loss causes ever greater pressures to build up against the employee undergoing a trial. The danger, therefore, of less than full co-operation is very real.

The manner in which obstacles can be placed in the way of the employee on trial are myriad, and often difficult to detect. Instances have been noted not only of an absence of instructions, but of over-supervision where the foreman continually "breathed down the neck" of the trial employee, instances of fellow employees' making his work more difficult, and instances of retaining the displaced employee in a super-numerary position until such time as the trial employee failed to qualify. The ingenuity of the work group in creating obstacles makes difficult complete control over the fairness of the trial period, and, to this extent, limits the value of the trial period as a criterion of ability.

The establishment of clear lines of promotion and demotion may help to minimize both the problem of incompetent operation and that of employee reaction to the employee undergoing trial. If the company could set up promotion ladders wherein each job is directly related to jobs above and below it in the promotional sequence, and would confine promotions and demotions to these clear-cut lines, the problem of incompetent operation would become more remote. In effect, each job is a training ground for the one above it. When a reduction in force occurs, the bumping employee merely slides back down the ladder into a job in which he has already gained previous experience. Further, in all likelihood, he would be working in the same social environment or among employees with whom he has had relatively close contact by reason of related jobs. Thus, the social stigma placed on the outside intruder would be lacking.

THE NEED FOR UNIFORM LAWS OF ARBITRATION*

by Alfred B. Carb

The growing confusion in the law relative to commercial arbitration resulting from the many conflicting provisions in the statutes of the several states and territories makes the adoption of a uniform legislation by all the states imperative. Uniformity on the subject is far more important than that the law include any particular provision either substantive or procedural. Despite the herculean nature of the task a strenuous effort should be made to find a common ground acceptable to the judiciary, the bar and the legislature of every state in the Union. Joint effort by legislative committees, the judiciary and the bar of the several states to work out an act acceptable on a nationwide basis is required if arbitration is to perform its function in commerce effectively. It should be remembered that the purpose of arbitration is not to supplant the established judicial system but rather to assist that system by providing a speedy method for resolving commercial disputes. (A uniform act can eliminate much of the delay and confusion that now exist.)

Past attempts to secure the adoption of a uniform arbitration law have met with mild success. The "Draft State Arbitration Act", sponsored by the American Arbitration Association, which was based on the New York act adopted in 1920 and provided for the enforcement of future disputes, was substantially adopted in some thirteen states. A Federal Arbitration Act was passed in 1925.

In the late 1920's, a Uniform Arbitration Act proposed by the National Conference of Commissioners on Uniform Laws was adopted only in four states. This Act is not to be confused with the present Uniform Arbitration Act adopted by the National Conference of Commissioners on Uniform Laws and approved by the American Bar Association in 1955 and 1956. This new Uniform Act has been

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adopted in Florida, Minnesota and Wyoming. Modern arbitration statutes prevail in the following states (the dates of their enactment are in parentheses): New York (1920), New Jersey (1923), Massachusetts (1925), Oregon (1925), California (1927), Louisiana (1928), Pennsylvania (1928), Arizona (1929), Connecticut (1929), New Hampshire (1929), Rhode Island (1929), Ohio (1931), Wisconsin (1931), Michigan (1941), Washington (1943), Florida (1957), Minnesota (1957), Wyoming (1959).

As previously noted, the present state statutes relating to arbitration of commercial activities contain many conflicting provisions. The decisions interpreting these statutes likewise contain numerous conflicts, both inter-jurisdictional and intra-jurisdictional. Confusion abounds in the decisions to such an extent that an orderly classification is rendered impossible. The unsettled problems inherent in the conflict of laws field make impossible definitive advice to clients as to their rights under an arbitration provision in a contract that is to be performed in more than one jurisdiction.

Further, many of the statutes specifically exclude the arbitration of questions involving the fee or a life estate in real property and contracts for personal service. It should also be noted that, in addition to the statutory procedures, most states will enforce common law arbitration. The retention of common law arbitration is valuable because if an arbitration proceeding fails to meet the technical requirements of the applicable statutes, the award may still be enforced as a common law award.

There is also much confusion in the state decisions on the question of whether the statutory technicalities relating to arbitration are adjective or substantive.

Notwithstanding the widespread use of arbitration in the settlement of disputes arising in commercial transactions, agreements in more than half the states, contemplating arbitration of future disputes, cannot be enforced. Even with respect to agreements to arbitrate existing disputes, statutes usually impose such technical requirements that agreements to arbitrate seldom meet them.

The widely divergent statutory provisions relating to the enforcement of agreements to arbitrate future disputes forcibly illustrates the need for uniform legislation. The differences make it apparent that there is also a need for widespread modernization of legislation on the subject. The Committee on Commercial Arbitration of the Section of Corporation, Banking and Business Law, American Bar

Association, believes that the Uniform Arbitration Act adopted by the National Conference of Commissioners on Uniform State Laws in 1955 and 1956, and approved by the American Bar Association, with some modifications, is the best way to achieve this objective.

The New York arbitration statute originally passed in 1920, and substantially adopted in seventeen other states, is the basis of the relatively simple Uniform Act. The Commissioners, in the preparation of the Uniform Act, had the benefit of the experience of these states. This experience demonstrates the areas that should be covered by a good arbitration act. An effective arbitration law should validate agreeements to arbitrate in accordance with commercial expectations, provide a simple procedure for their enforcement, and restrict judicial intervention in the functions of the arbitrators to a minimum. Although arbitration was recognized in the common law hundreds of years ago, some reluctance to accept it on the part of the judiciary must be recognized. This reluctance may well be the reason that only three states have adopted the Uniform Act to date.

The experience in states that have enacted modern arbitration laws indicates that an effective arbitration statute should possess the following minimal provisions:

1. Arbitration agreements should be made enforceable with a minimum of technical requirements. Section 1 of the Uniform Act requires only that the agreement be in writing. It need not be acknowledged or filed nor need any other formality be observed. It cannot be oral for this would not be in keeping with good commercial practice and might lead to unfounded assertion of claims that such agreements had been made.

There has been a tendency both in statutes (see § 1448 N.Y. Civ. Pr. Act) and judicial decisions to limit the recognition and enforcement of arbitration agreements to those cases where the controversy could be the subject of an action in court. This led in *Application of Burkin,* 1 N.Y. 2nd 570 (1956), to the holding that the court would not enforce an agreement to arbitrate a dispute over corporate policy between two sole stockholders of a corporation holding the stock equally divided between them. The Uniform Act explicitly negates this requirement in Section 12 (a).

The elimination of this provision from the Uniform Act should be given serious consideration. Arbitration must be considered as an adjunct to our established judicial system and not as a replacement thereof. There appears no logical reason why a court should be

required to enforce an award which the court would not have had the power to make. Also it is felt that by the elimination of this provision and the adoption of a provision consistent with the holding in the *Burkin* case, *supra,* additional support for the adoption of the Uniform Act may be obtained.

It should be noted that Section 1448 of the N.Y. Civ. Pr. Act was amended (effective September 1, 1959) by the 1959 legislature so as to permit the arbitration of questions arising out of valuations, appraisals or ancillary matters subsequent to or independent of any issue between the parties "without regard to the justiciable character of such questions or controversies".

2. The statute should explicitly nullify the common law rule that agreements to arbitrate future disputes will not be enforced because they oust the courts of jurisdiction. Section 1 of the Uniform Act validates such agreements. Arbitration is too much a part of modern commercial life to continue this remnant of 19th Century thinking in our law.

3. The act should provide a simple judicial procedure by which a controversy may be promptly determined as to whether an agreement to arbitrate has been made or whether a particular dispute falls within its terms. Under the Uniform Act the motion procedure with which the state is familiar is utilized. See Sections 2 and 16. A motion is made for an order to direct or to stay the arbitration, as the case may be. The delay and expense of an action to enforce or enjoin arbitration is not involved. The New York doctrine found in *International Association of Machinists* v. *Cutler-Hammer, Inc.,* 271 App. Div. 917, 67 N.Y.S. 2d 317, affirmed per curiam, 297 N.Y. 519, 74 N. E. 2d 464 (1947), is expressly negated. This case held that the dispute in issue will first be examined and the order denied if the dispute is believed not to be bona fide or based on substantial grounds. Section 2(e). Further study and possibly some modification of this Section of the Uniform Act are indicated.

4. The law should outline the basic requirements of a fair arbitration hearing, such as the opportunity to be heard, to cross examine witnesses, etc., where the agreement fails to incorporate them, as it usually does. These safeguards are specified in Section 5 of the Uniform Act. So also are the powers of the arbitrators to act by majority vote and to subpoena witnesses. See Section 7, etc. Section 6 expressly provides that a party to an arbitration proceeding is entitled to be represented by an attorney.

5. A simple method of resolving controversy over the validity of the award rendered should be provided. The Uniform Act includes the traditional grounds for setting aside an award and resorts again to the motion procedure of the state for obtaining a judicial determination of the question. See Section 12.

6. The arbitrator should be enabled, at the instance of a party or court, to modify the award in order to correct mistakes, or to make plain what was intended or to supply a missing but essential provision. Few statutes provide this needed safeguard. It is contained in Section 9 of the Uniform Act.

7. A direct and simple method of enforcement should be included. To compel the successful party to resort to litigation for the enforcement of the award largely defeats the purpose of arbitration in securing a prompt determination of the dispute with a minimum of expense. Again the Uniform Arbitration Act relies upon the motion procedure with which the bar of the state is familiar, to reduce the award to a judgment which is enforceable as any other judgment of a court of the state. Sections 11 and 14.

8. For business activities extending beyond state lines, a uniform statute supplying the basic substantive and procedural law necessary to validate and effectuate an arbitration agreement is especially desirable and can only be supplied through a Uniform Act adopted by the several states. Uniformity of legislation on this subject is of the utmost importance. A concerted effort of the bar of each state to work together to formulate and secure the passage of uniform laws relating to arbitration is clearly indicated.

A survey of the use of commercial arbitration indicates an increase in the employment of arbitration for settlement of commercial and labor disputes of approximately 20% a year. A recent development is the arbitration of accident claims which from the year 1956 to 1957 increased by 300%. As previously noted, the fact that the statutory procedures are regarded as substantive in some states and adjective in others, the numerous technicalities surrounding arbitration in the various states and the increasing confusion of the conflict of laws questions arising in arbitration, make it imperative that the states adopt uniform laws of arbitration. The adoption of such laws is certainly as desirable as was the adoption of the Uniform Laws relating to negotiable instruments and sales.

CONSIDERATIONS OF EQUITY IN VACATUR OF ARBITRAL AWARDS

by Gerald F. Gold

It may be said that the primary and fundamental purpose of arbitration is to effect a "summary and extrajudicial settlement" of controversies as between disputing parties. Although arbitration as a means of resolving disputes has been in use in New York since colonial times,[1] the recent rapid growth of both domestic and international commercial arbitration has been most noteworthy.[2] Since the resort to arbitration has expanded in recent years, an effective and legally sound arbitration system must provide an unsuccessful party the right to attack an arbitration award on grounds similar to which an order or judgment of a trial court is subject to review. This the New York statute has expressly sought to accomplish.[3] Pursuant to the New York statutory scheme, the losing party in an arbitration proceeding may challenge the award in one of two ways: by opposing a motion to confirm or by making a motion to vacate the award.[4] In either case the grounds for setting aside the award are the same and are explicitly enumerated in the statute. Such statutory grounds upon which the court must vacate and set aside an arbitration award are: (1) where the award was procured by corruption, fraud or other undue means;[5] (2) where there was evident partiality or corruption

1. Though arbitration in New York today is largely governed by Article 84 of the Civil Practice Act, arbitration may also be had under the common law—N.Y. Civ. Prac. Act, sec. 1469. See also 17 Rep. N.Y. Judicial Council 231 (1951).
2. Herzog, "Commercial Arbitration: A Tool for the Lawyer", 4 *Boston B.J.* 7 (1960); Domke, "International Commercial Arbitration In The United States", 1959 *J.Bus.L.* 303 (1959); Walker, "Commercial Arbitration In United States Treaties", 11 *Arb .J.* (*n.s.*) 68 (1956).
3. N.Y. Civ. Prac. Act, sec. 1462.
4. N.Y. Civ. Prac. Act, sec. 1463.
5. N.Y. Civ. Prac. Act, sec. 1462 (1). Examples of cases vacating an award under this subdivision are: Matter of Livingston (Banff, Ltd.), 13 Misc. 2d 766, 178 N.Y.S. 2d 973 (Sup. Ct. 1958), wherein it was held that where a copy of the contract which was delivered to the arbitrators at the close of the hearing differed from the true contract,

in the arbitrators or either of them;[6] (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy or of any other misbehavior by which the rights of any party have been prejudiced;[7] (4) where the arbitrators or other persons making the award exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award

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such mistake constituted "undue influence"; Matter of Brody (Owen), 259 App. Div. 720, 18 N.Y.S. 2d 28 (2nd Dep't. 1940), holding that arbitration agreement was procured by fraud where defendant who was unable to read or write English was induced to sign a paper misrepresented as "registry of his appearance" when in fact it was an agreement to arbitrate; Matter of Lipschutz (Gutwirth), 304 N.Y. 58, 106 N.E. 2d 8 (1952), stating that an award will be vacated if procured by fraud or tainted by interest of the arbitrator.

6. N.Y. Civ. Prac. Act, sec. 1462 (2). Cases illustrative of this subdivision are: Matter of Shirley Silk Co., Inc. (American Silk Mills, Inc.), 260 App. Div. 572, 23 N.Y.S. 2d 254 (1st Dep't. 1940), award vacated where arbitrator designated by respondent failed to reveal to appellant that prior to the arbitration, the firm of which he had once been president, in another arbitration proceeding had received a substantial award from the board of arbitrators of which the president of respondent was one; Application of Siegel, 153 N.Y.S. 2d 673 (Sup. Ct. 1956), where award vacated where arbitrator failed to reveal that he had been a business partner of one of the parties to the arbitration; Matter of Knickerbocker Textile Corp. (Sheila-Lynn, Inc.), 172 Misc. 1015, 16 N.Y.S. 2d 435 (Sup. Ct. 1939), aff'd, 259 App. Div. 992, 20 N.Y.S. 2d 985 (1st Dep't. 1940), holding that partiality on the part of one of the three arbitrators is ground for vacating award, although award unanimous; Matter of Friedman (Friedman), 215 App. Div. 130, 213 N.Y. Supp. 369 (1st Dep't. 1926), vacating award where arbitrator asked for and accepted a loan from one of the parties to the arbitration proceeding.

7. N.Y. Civ. Prac. Act, sec. 1462 (3). Instances in which arbitration awards have been set aside under this section are: Matter of Simons (New Syndicate, Inc.), 152 N.Y.S. 2d 236 (Sup. Ct. 1956), chairman having material before him not presented to other arbitrators; Matter of Navarro (Kachurin), 266 App. Div. 181, 41 N.Y.S. 2d 585 (1st Dep't. 1943), vacating award upon arbitrators' refusal to adjourn hearings to afford opportunity to secure further evidence of excessive freight charges; Matter of Universal Metal Prod. Co., Inc. (United Elec. Radio & Mach. Workers of America), 179 Misc. 1044, 40 N.Y.S. 2d 265 (Sup. Ct. 1943), where award vacated upon refusal to hear evidence; Matter of Berizzi Co., Inc. (Krausz), 239 N.Y. 315, 146 N.E. 436 (1925), award vacated where arbitrator after hearing had been closed and without notice to the parties, made a personal investigation of the controversy; Matter of Bullard (Morgan H. Grace Co., Inc.), 210 App. Div. 476, 206 N.Y. Supp. 335 (1st Dep't. 1924), aff'd, 240 N.Y. 388, 148 N.E. 559 (1925), where before all the testimony had been taken, one of the arbitrators withdrew and took no part in the subsequent proceedings, and the award made by the remaining arbitrators was vacated.

upon the subject-matter submitted was not made;[8] and (5) if there was no valid submission and contract, and the objection has been raised under the conditions set forth in section [1458].[9] It should be noted that the New York statute in providing grounds for challenging an arbitration award is not unique, but such grounds as stated above are generally those which are sufficient to vacate an award in most other states[10] and are indeed almost identical with the grounds set forth in the Uniform Arbitration Act.[11]

New York courts have vacated and set aside arbitration awards on grounds other than those specified in the New York statute. Such grounds have been adduced by the courts which will warrant vacating an award, even though the New York courts have

8. N.Y. Civ. Prac. Act, sec. 1462 (4). Cases in which arbitration awards have been vacated under this subdivision are: Matter of Kyne (Molfetas), 3 A.D. 2d 384, 160 N.Y.S. 2d 605 (1st Dep't. 1957), where an award directed payment to unnamed individuals, it was held imperfectly executed and remanded to clarify the ambiguity; Matter of Minskoff (Rhean Builders Corp.), 282 App. Div. 918, 125 N.Y.S. 2d 344 (4th Dep't. 1953), vacating arbitrator's report which was self-contradictory; Matter of Pfeiffer, Inc. (Largman Gray Co.), 222 App. Div. 62, 225 N.Y. Supp. 294 (1st Dep't. 1927), holding award too vague and indefinite which directed petitioner to deliver the quantity of silk contracted to be sold in accordance with that called for by the contracts without identifying any particular silk as thus conforming; Matter of Weil, Inc., 73 N.Y.S. 2d 707 (Sup. Ct. 1947), aff'd, 274 App. Div. 1053, 86 N.Y.S. 2d 460 (1st Dep't. 1949), vacating an award upon the failure of the third arbitrator to participate in the rendering of the award, where the submission provided for a decision by three arbitrators.

9. N.Y. Civ. Prac. Act, sec. 1462 (5). Illustrations of cases vacating and setting aside awards under this subdivision are: Matter of Behrens (Feurring), 182 Misc. 979, 49 N.Y.S. 2d 753 (Sup. Ct. 1944), aff'd, 269 App. Div. 930, 58 N.Y.S. 2d 216 (1st Dep't. 1945), aff'd, 296 N.Y. 172, 71 N.E. 2d 454 (1947), wherein the arbitration agreement held not properly executed; Matter of Schafran & Finkel, Inc. (M. Lowenstein & Sons, Inc.), 280 N.Y. 164, 19 N.E. 2d 1005 (1939), where notice demanding plaintiff arbitrate his refusal to accept goods held not to be a bar for plaintiff to show that he did not agree to arbitrate; Matter of Onondaga Silk Co., Inc. (Roseville Frocks, Inc.), 194 Misc. 326, 86 N.Y.S. 2d 154 (Sup. Ct. 1949), holding no valid submission or contract.

10. Comment, "When May An Arbitrator's Award Be Vacated?", 7 *De Paul L. Rev.* 236 (1957-1958); Note, "Arbitration Awards Vacated For Disqualification Of An Arbitrator", 9 *Syracuse L. Rev.* 56 (1957-1958).

11. U.A.A., sec. 12, adopted by the National Conference of the Commissioners on Uniform State Laws, August 20, 1955, as amended August 24, 1956. Approved by the House of Delegates of the American Bar Association, August 26, 1955 and August 30, 1956.

consistently and steadfastly held to the position that only the statutory grounds for setting aside an award can be asserted and that no grounds other than those specifically enumerated can be taken advantage of.[12] This seemingly axiomatic proposition was precisely stated by the Court of Appeals in *Matter of Wilkins*:[13]

> A statute was, however, subsequently enacted providing that for certain specified reasons an award might be vacated, modified or corrected. Since its adoption it has been uniformly held in this state that the power of the court to review or vacate an award is limited to the power expressly conferred by the plain words of the enactment, and that an award is conclusive and final as to the questions decided, unless it is modified, corrected or vacated in the manner and upon the specific grounds provided by the statute.

The first group of cases in which the New York courts have vacated arbitration awards for reasons other than those specified in the Civil Practice Act are those cases where the award contravenes or transgresses a particular statute. The frequently cited case, *Matter of Western Union Tel. Co. (ACA)*,[14] is perhaps the most noted case in this regard. Here the New York Court of Appeals vacated an award which directed reinstatement of those employees whose acts on the job were in violation of Penal Law sections 552(2) and 1423(6), which sections make it criminal for telegraph employees wilfully to refuse to transmit messages, or to wilfully delay delivery of messages.[15] The reasoning of the court was that the award sanctioned violations of the criminal laws and as such was contrary to public policy; that awards which give countenance to the commission

12. C. Itoh & Co. Ltd. (Boyer Oil Co., Inc.), 198 App. Div. 881, 191 N.Y. Supp. 290 (1st Dep't. 1921); Application of Spectrum Fabrics Corp. (Main St. Fashions), 285 App. Div. 710, 139 N.Y.S. 2d 612 (1st Dep't.), aff'd, 309 N.Y. 709, 128 N.E. 2d 416 (1955); Matter of Weiner Co. (Freund Co.), 2 A.D. 2d 341, 155 N.Y.S. 2d 802 (1st Dep't 1956), aff'd, 3 N.Y. 2d 806, 144 N.E. 2d 647 (1957); Wheat Export Co., 185 App. Div. 723, 173 N.Y. Supp. 679 (1st Dep't.), aff'd, 227 N.Y. 595, 125 N.E. 926 (1919); Matter of Grayson-Robinson (Iris Corp.), 9 Misc. 2d 796, 168 N.Y.S. 2d 513 (Sup. Ct. 1957), aff'd, 7 A.D. 2d 367, 183 N.Y.S. 2d 695 (1st Dep't. 1959).
13. 169 N.Y. 494, at 498-99, 62 N.E. 575 (1902).
14. 299 N.Y. 177, 86 N.E. 2d 162 (1949).
15. P.L. sec. 552(2) makes it a criminal offense for telegraph employees to wilfully refuse or neglect to transmit or deliver messages, while P.L. sec. 1423 (6) makes it a criminal offense to wilfully prevent, obstruct or delay such transmission or delivery of messages.

of acts contrary to the provisions of statutes will be vacated. As the telegraph operators had conducted themselves in a manner expressly forbidden by statute and as the statute was declarative of the policy to avoid disruption of the public service performed by a telegraph company, the New York courts were not disposed to approve the arbitrator's award of reinstatement. As was succinctly stated by the court at one stage of the proceeding:[16]

> Moreover, apart from the arbitrator's assumption of powers expressly denied to him, the award should be further vacated on the ground that it sanctions violations of the criminal laws of the State of New York. . . . Since the arbitrator's award tends to condone and encourage the commission of illegal acts, judicial assistance or recognition should not be given to it.

Another series of cases wherein arbitration awards are usually set aside as contrary to statutes are those awards which are based upon an illegal contract which infringes the New York usury laws.[17] A claim arising out of a usurious transaction is void under New York law[18] and an award based thereon is also held void, the theory being that awards having sprung from illegal contracts have no more validity than the contracts themselves. And this proposition is not peculiar to New York for it is generally held that where the claim referred to arbitration is illegal, no award rendered thereon can be of any binding effect for reducing it to an award does not purge it of its illegality.[19] As was declared by the court in *Matter of Gale*:[20]

> Through the enactment of its usury laws, our State has declared its public policy to be against the enforcement of a usurious contract. Where public policy is so expressed, arbitrators can neither ignore, nor by any award nullify, that public policy.

Therefore, although it may as a general rule of law be stated that any

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16. Matter of Western Union Tel. Co. (ACA), 274 App. Div. 754, at 754, 79 N.Y.S. 2d 545 (1st Dep't. 1948).
17. Matter of Gale (Hilts), 176 Misc. 277, 27 N.Y.S. 2d 18 (Sup. Ct.), rev'd on other grounds, 262 App. Div. 834, 28 N.Y.S. 2d 270 (1st Dep't.), motion for leave to appeal denied, 262 App. Div. 1006, 30 N.Y.S. 2d 845 (1941); Matter of Application of Metro Plan, Inc., 257 App. Div. 652, 15 N.Y.S. 2d 35 (1st Dep't. 1939), involving arbitration of a usurious mortgage.
18. N.Y. Gen. Bus. Law, sec. 373.
19. Sturges, *A Treatise on Commercial Arbitrations and Awards* 202 (1930). See also 6 C.J.S. *Arbitration and Award* sec. 12 (1937); 3 Am. Jur. *Arbitration and Award* sec. 11 (1936).
20. Supra note 17, at 281.

controversy or dispute may be made the basis of arbitration, even a claim which may not be enforced in an action at law,[21] if such claim offends a statutory policy any award rendered thereon will be vacated upon proper application to the court.

In addition to vacating arbitration awards which contravene some express statutory policy, another area in which the courts have nullified and set aside arbitral awards concerns itself with awards based on matrimonial disputes. The cases which have arisen under this topic deal primarily with arbitration clauses in separation agreements whereby provision is made to arbitrate custody rights or the right of visitation of minor children. The New York courts, in the few reported cases, have established the rule that an arbitration award dealing either with the right of custody or the right of visitation of children is not binding and may be challenged by the unsuccessful party, and the court in the exercise of its equitable power may make a disposition contrary to the arbitration award.[22] The general reasoning of the courts has been to the effect that such matters as the custody of a child and the right of visitation can never be made the subject of contract as only the court has jurisdiction to determine custody and visitation rights regardless of an agreement between the parents; and that as the Supreme Court of the State of New York stands in relation of *parens patriae* to infants, the Supreme Court alone may determine custody and visitation rights, such determination being based on a judicial finding as to the best interests of the minor.[23] It may therefore be said, after a careful examination of the

21. Application of Roselle Fabrics (J. P. Stevens & Co.), 108 N.Y.S. 2d 921 (Sup. Ct. 1951), aff'd, 279 App. Div. 1044, 113 N.Y.S. 2d 280 (1st Dep't. 1952); Matter of Spectrum Fabrics Corp. (Main St. Fashions), supra note 12. See also Russell, *Arbitration and Award* 1-6 (14th ed. 1949); Sturges, op. cit. supra note 19, secs. 60-65.

22. Waltman v. Waltman, vol. 103, No. 12, N.Y.L.J., January 15, 1940, at 221, Col. 7 (Sup. Ct.), withholding approval of an arbitrator's award concerning right of visitation; Matter of Hill (Hill), 199 Misc. 1035, 104 N.Y.S. 2d 755 (Sup. Ct. 1951), denying application of motion to compel arbitration regarding the custody of minor child pursuant to a provision of a separation agreement; Matter of Michelman (Michelman), 5 Misc. 2d 570, 135 N.Y.S. 2d 608 (Sup. Ct. 1954), holding that right of visitation with respect to a minor child not a proper subject of arbitration irrespective of any agreement between the parents.

23. Kunker v. Kunker, 230 App. Div. 641, 246 N.Y. Supp. 118 (3rd Dep't. 1930); People ex rel Herzog v. Morgan, 287 N.Y. 317, 39 N.E. 2d 255 (1942); People ex rel Converse v. Derrick, 146 Misc. 73, 261 N.Y. Supp. 447 (Sup. Ct. 1933); Weinberger v. Van Hessen, 260 N.Y. 294, 183 N.E. 429 (1932).

New York cases, that not only is the submission of custody rights and the right of visitation of minors to arbitration highly questionable, but an award based thereon is open to attack because of the public policy of the State to have its courts pass upon questions which affect its wards.[24] And not only is arbitration in matrimonial matters not favored in custody and visitation cases, but arbitration of children's support also has not met with acceptance by the courts.[25] Although arbitration may serve a useful purpose in resolving certain marital disputes,[26] where the controversy involves the determination of an infant's status, the best interests of the child must be determined upon a judicial hearing and not an arbitration—an arbitration award here merely offers a losing and dissatisfied party an opportunity to have it set aside and the chance to reargue the entire question anew before a court. As was expressed by the court in *Matter of Michelman*:[27]

> Since it is well known that arbitrators need not follow the law in their considerations and awards, the courts in this state have in certain situations involving public policy set aside awards in conflict with such policy, and have refused to direct arbitration in such situations.

It is a fundamental rule of law now well developed and established in New York that errors of the arbitrators either as to law or fact are not grounds for vacating the award nor are they basis for review by the courts.[28] There is no provision in the statute listing

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24. Lindey, "Arbitration In Matrimonial Matters", 1 *Arb. J.* 345 (1939).
25. Matter of Matsner (Fried), 276 App. Div. 1073, 96 N.Y.S. 2d 584 (1st Dep't.), aff'd, 301 N.Y. 699, 95 N.E. 2d 53 (1950); Dianda v. Volkman, vol. 127, No. 23, N.Y.L.J., February 1, 1952, at 454, Col. 1 (Sup. Ct.). Though it should be noted that clauses in separation agreements calling for arbitration to fix support for the wife have been upheld in New York supposedly as not involving questions directly relating to minors over which the courts take an active intrest, Matter of Robinson (Robinson), 296 N.Y. 778, 71 N.E. 2d 214 (1947); Matter of Luttinger (Luttinger), 294 N.Y. 855, 62 N.E. 2d 487 (1945); Zuckerman v. Zuckerman, 96 N.Y.S. 2d 190 (Sup. Ct. 1950).
26. Lindey, op. cit. supra note 24.
27. Supra note 22, at 570.
28. Matter of Wilkins, supra note 13; Matter of Pine St. Realty Co., Inc. (Coutroulos), 233 App. Div. 404, 253 N.Y. Supp. 174 (1st Dep't. 1931), Matter of A. D. Julliard & Co., Inc. (Baitch & Castaldi Inc.), 2 Misc. 2d 753, 152 N.Y.S. 2d 394 (Sup. Ct. 1956); Matter of Dembitzer (Gutchen), 3 A.D. 2d 211, 159 N.Y.S. 2d 327 (1st Dep't.), aff'd, 3 N.Y. 2d 851, 144 N.E. 2d 728 (1957); Matter of Nadalen Mills (Barbizon Corp.), 206 Misc. 757, 134 N.Y.S. 2d 612 (Sup. Ct. 1954).

errors of law or fact by the arbitrators as grounds for vacation.[29] But the courts of New York have vacated and set aside awards for errors of law where such appear on the face of the award, even though the statute does not enumerate this as one of the grounds for vacating arbitration awards.[30] In order for the court to vacate an award in this respect, it is necessary that the error of law appear upon the face of the award—this qualification being solely inserted so as to indicate to the court that the arbitrators intended to decide the case according to the law. If the arbitrators have mistaken the law and the grounds for their decision are not justified in law, the court will set it aside, the theory for this having been concisely stated in the leading case of *Fudickar v. Guardian Mutual Life Ins. Co.*:[31]

> . . . It [the arbitration award] may also be set aside for errors of law, where the question of law is stated on the face of the award, and it appears that the arbitrators meant to decide according to the law but did not. In both these cases the award is not what the arbitrators themselves intended. It is not in fact their judgment; for, except for the mistake, the award would have been different.

Accordingly, errors of law appearing on the face of the award, although not a statutory ground for vacating and setting aside an arbitration award, will be sufficient basis for a New York court to

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29. See notes 5-9, supra.

30 Fudickar v. Guardian Mutual Life Ins. Co., 62 N.Y. 392 (1875), involving a suit by a discharged employee for breach of contract against his former employer and a cross action for damages by employer caused by the misconduct of the employee, the case being submitted to an arbitrator who found that employee was justly dismissed; Matter of Drug Store Employees Union (Reid & Yoeman's, Inc.), 265 App. Div. 870, 37 N.Y.S. 2d 911 (2nd Dep't. 1942), wherein court held that union contract is to be deemed a contract between employer and each individual employee; Matter of Friedman (Video Television, Inc.), 281 App. Div. 815, 118 N.Y.S. 2d 844 (1st Dep't. 1953), where an arbitration award fixed the purchase price to be paid by a corporation for a retiring stockholder's shares and provided for payments in instalments over a period of time, but court modified award to conform with statutory requirements (Stock Corp. L. sec. 58; P.L. sec. 664 (2)) that payments of instalments be made only in years in which surplus was available. See also Matter of Weiner Co. (Freund Co.), supra note 12; Matter of Tarello (John A. Johnson Contracting Co.), 50 N.Y.S. 2d 212 (Sup. Ct.), aff'd, 268 App. Div. 893, 51 N.Y.S. 2d 87 (1st Dep't.), motion for leave to appeal denied, 268 App. Div. 903, 51 N.Y.S. 2d 640 (1st Dep't. 1944); Matter of Bolton (General Acc. Fire & Life Assur. Corp.), 295 N.Y. 734, 65 N.E. 2d 563 (1946).

31. Supra note 30, at 400.

vacate the award. Once again the courts here rely on the public policy doctrine that but for the mistake in applicable law, the award would have been otherwise and the losing party might very well have been the successful party if the arbitrators had correctly applied the law they intended to so apply—that is, a losing party should not be deprived of winning the arbitration proceeding where he would have done so had not the arbitrators mistakenly applied the law.

Although the amount of the arbitration award, whether such be excessive or inadequate, is not a statutory ground for vacating an award, it appears from the few decided cases on the subject that an arbitration award which is excessive or which permits punitive damages will be set aside as improper.[32] The decisive case in this area, *Matter of Publishers' Ass'n (Newspaper Union)*,[33] where pursuant to an arbitration clause in a union contract, the arbitrators in addition to awarding compensatory damages awarded punitive damages and such part of the award was thereafter vacated by the court, would seem to indicate that the courts will disapprove such awards when challenged. Here once again public policy underlies the court's decision—i.e., the traditional refusal either to allow punitive damages[34] or to enforce a contract provision for a penalty as distinguished from liquidated damages.[35] This general judicial disallowance of punitive damages in contract cases and the unenforceability of penalty damage clauses, and the adherence to such in the *Publishers' Ass'n* case would therefore seem to be sufficient ground to attack a grossly excessive award as improper. As the court distinctly declared in *Matter of Publishers' Ass'n (Newspaper Union)*:[36]

> In vacating part of the award, however, our decision is based on the broader ground that the allowance of punitive damages is not enforceable with the aid of the judicial power, . . .

The above discussion classifies the cases into three or four groups wherein arbitration awards have been vacated and set aside on other than the listed statutory grounds. Although these are the main non-

32. Matter of Publishers' Ass'n (Newspaper Union), 280 App. Div. 500, 114 N.Y.S. 2d 401 (1st Dep't. 1952), where arbitrators under a union contract having an arbitration clause found the union had violated the no strike clause in the contract, and in addition to awarding $2,000 actual damages, awarded $5,000 punitive damages if union again violated its contract and then only on the option of the employer.
33. Supra note 32.
34. 5 Corbin, *Contracts* sec. 1077 (1951).
35. 5 Corbin, *Contracts* sec 1057 (1951).
36. Supra note 32, at 507.

statutory reasons for setting aside awards, there have been other instances in which arbitration awards have been vacated without resort to the specific mandates of the statute.[37] Thus, in conclusion, it may be said that although the courts have generally confined themselves to the statutory grounds for vacating arbitration awards,[38] they have on occasion vacated awards on non-statutory grounds, thereby indicating a tendency to permit the use of equitable considerations, almost always on the theory of public policy, to enter into their determination and consideration of the matter. Consequently, despite the courts' persistent and unyielding declarations that only the enumerated statutory grounds can be asserted and taken advantage of in vacating an award[39] and notwithstanding New York's close adherence to the statutory rule of construction, *expressio unis est exclusio alterius*,[40] a New York court in a proper case may through the exercise of its inherent equitable power vacate and set aside an arbitration award although there be no express statutory authority for its action.

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37. Matter of Republique Francaise (Cellosilk Mfg. Co.), 309 N.Y. 269, 128 N.E. 2d 750 (1955), holding that New York court did not acquire the necessary in personam jurisdiction over a party to the arbitration proceeding; Day v. Hammond, 57 N.Y. 479 (1874) and Hinkle v. Zimmerman, 184 N.Y. 114, 76 N.E. 1080 (1906), where court upon proper application may set aside award where arbitrators have failed to take the oath.
38. Matter of Delma Engineering Corp. (Johnson Contr. Corp.), 267 App. Div. 410, 45 N.Y.S. 2d 913 (1st Dep't.), aff'd, 293 N.Y. 653, 56 N.E. 2d 253 (1944); Application of Davis, 57 N.Y.S. 2d 387 (Sup. Ct. 1945); Matter of Pine St. Realty Co. (Coutroulos), supra note 28.
39. See note 12, supra.
40. The express statutory mention of certain things impliedly excludes others not mentioned. N.Y. McK. Statutes sec. 240; Jackson v. Citizens Cas. Co., 277 N.Y. 385, at 390, 14 N.E. 2d 446 (1938); Dezsofi v. Jacoby, 178 Misc. 851, at 854, 36 N.Y.S. 2d 672 (Sup. Ct. 1942).

DOCUMENTATION

Excerpts from Two U.N. Documents

Dispute Settlement Provisions in Concession Agreements*

In the absence of some special arrangement, the courts of the territorial sovereign are the forum to which disputes, arising from the operations there of a foreign enterprise, will be submitted. Special provisions on dispute settlement may be found in laws concerning natural resources, in concession agreements pursuant to a law authorizing arbitration clauses and in concession agreements in countries where no general natural resources law exists.

Many Latin American States, as was mentioned above, have constitutional provisions subjecting foreign persons and enterprises to their courts as well as to their laws. (The Constitution of *El Salvador* declares that "No contract may be concluded in which the decision, in the event of controversy, is to be rendered by the courts of a foreign country.") There may, however, be special provisions determining which national courts are to have jurisdiction. Thus the Petroleum Code of *Bolivia* lays down that:

> "All doubt or controversy regarding the fulfillment of the terms of the concessions and the interpretation of this law or its regulations shall be resolved by common accord between the Executive Power and the concessionaire. In the event of lack of agreement between the parties, the matter shall be submitted directly to the Supreme Court of Justice of Bolivia for final decision." (Article 19).

Technical or accounting matters are to be decided by experts named by the parties, and if they disagree and fail to name an umpire, a third arbitrator will be chosen by the President of the American Institute of Mining Engineers and Metallurgists (Article 19).

The petroleum laws of *Spain*[1] and *France* (for the Sahara re-

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* The Status of Permament Sovereignty over Natural Wealth and Resources. Preliminary Study by the Secretariat of the United Nations, of December 15, 1959, U.N. DOC. A/AC.97/5 p. 73.

1. "The holders of permits and concessions are subject, without limitations, to the Spanish laws and tribunals." Law of 26 Nov. 1958, Art. 57 (*Boletin Oficial* No. 311).

gions),[2] both provide for final decisions to be given by domestic tribunals. In *Italy,* provision is made in the Petroleum Law for settlement of disputes by arbitration in accordance with the relevant articles of the Italian Civil Procedure Code,[3] and in *Pakistan,* if the arbitrators appointed by the parties disagree, a dispute is to be decided by a judge of the Federal Court of Pakistan.[4] The petroleum law of *Libya* authorizes the insertion of a detailed arbitration clause in concessions by the terms of which disputes are to be settled by an international arbitration under the rules of procedure established under Articles 32 to 69 inclusive of the Rules of Court of the International Court of Justice. If the parties fail to agree on the appointment of a third arbitrator, he is to be appointed by the President, or in certain circumstances, the Vice President, of the International Court. The concessions are to be governed and interpreted "in accordance with the Laws of Libya and such principles and rules of international law as may be relevant."[5]

Apart from the detailed provisions contained in laws relating to natural resources, there are also laws which merely allow the possibility of special choice of law and choice of forum clauses to be inserted in the concession agreements made in terms of the law. The Petroleum Law of *Morocco* contains an interesting article, according to which the concession agreements may provide for recourse to arbitration, and these agreements may fix upon "a procedure inspired by international practice in the matter of petroleum arbitration, and may contain a compromissory clause."[6] The foreign investment law of *Greece* provides that disputes "shall be settled by arbitration as prescribed in the instrument of approval, it being understood that a foreign national, who may be a natural person or a legal entity in official capacity or a person of recognized reputation in legal matters, may also be selected as a third arbitrator."[7] The Petroleum Law of *Iran* lays down conciliation and arbitration as the applicable dispute

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2. "Les litiges entre concédant et concessionnaire, relatifs à l'application de la convention, relèvent en premier et dernier ressort du Conseil d'Etat statuant au contentieux." Art. 41 of Ordonnance No. 58-111 of 22 Nov. 1958 (*Journal Officiel,* 23 Nov. 1958).
3. Law No. 6 of 11 Jan. 1957, Art. 36.
4. Pakistan Petroleum (Production) Rules 1959, Rule 40, and Pakistan Mining Concession Rules 1949, Rule 80.
5. Second schedule to the Libyan Petroleum Law, No. 25 of 1955, Clause 28.
6. Dahir No. 1-58-227 of 21 July 1958 (*Bulletin Officiel,* 24 July 1958) Art. 39.

settling mechanisms and leaves the details for insertion in particular concession agreements.[8] In two of recent agreements under this law, there are detailed arbitration provisions, including the appointment, if the parties do not otherwise agree, of an umpire by the President of the Swiss Federal Tribunal.[9] A third agreement gives this power of appointment to the President of the Cantonal Tribunal at Geneva and provides that the arbitral tribunal shall sit at Geneva. In the case that the President of the Cantonal Tribunal should refuse, or be unable, to make the appointment, his function is to be transferred to the presidents of the Supreme Courts of *Denmark, Sweden* or *Brazil*, in that order.[10]

Finally, dispute settlement may be regulated entirely by the terms of a concession agreement, in the absence of a petroleum or mining law. Article 40 of the amended Convention between the Government of *Iraq* and the Turkish Petroleum Company provides for appointment of a referee by the President of the International Court of Justice if the parties or their arbitrators fail to agree upon one. The decision of the arbitrators, or of the referee if they disagree, is final.[11] The same provision is to be found in Article 33 of the Offshore Concession Agreement between the Sheikh of *Kuwait* and the Arabian Oil Company, Ltd., a subsidiary of Japan Petroleum Trading Company, Ltd.;[12] and the Offshore Concession Agreement between the Government of *Saudi Arabia* and Japan Petroleum Trading Company, Ltd.,[13] contains a similar arrangement, both concessions being over offshore areas of the Neutral Zone in the undivided sovereignty of Saudi Arabia and the Sheikh of Kuwait.

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7. L.D. No. 2687 of 31 Oct. 1953, Art. XII.
8. Iranian Petroleum Law of 31 July 1957, Art. 14.
9. Agreement between Pan American Petroleum Corporation and the National Iranian Oil Company, 24 April 1958, Art. 41; Agreement between Sapphire Petroleums, Limited, and the National Iranian Oil Company, June, 1958, Art. 41.
10. Agreement between the National Iranian Oil Company and AGIP Mineraria, concluded at Teheran on 3 Aug. 1957, Art. 44.
11. Convention dated 14 March 1925 between the Government of Iraq and the Turkish Petroleum Company, Limited. The identical arbitration clause is to be found in Art. 41 of the Basrah Company's Convention of 29 July 1938, as amended, and in Art. 39 of the Mosul Oil Company's Convention, dated 20 April 1932, as amended.
12. Agreement entered into at Kuwait on the 18th day of the month of Dhulhijjah in the year 1377, corresponding to 5 July 1958.
13. Agreement entered into at Riyad on the 18th day of the month of Jumada I, the year 1377 A.H., corresponding to 10 Dec. 1957. The arbitration clause is contained in Art. 55.

Arbitration of Investment Controversies*

Yet, there remains the very real problem of the insecurity of foreign investments, whether as an actual danger or as a subjective deterrent in the estimation of the investor. Here, it is widely felt that what is lacking is not so much a definition of his rights, as an effective forum in which to enforce them. This lack springs chiefly from the reservations which the investor might feel toward reliance either on foreign courts and agencies with which he is not familiar, or on the support of his own government, which in practice he may have difficulty in securing and which, in many countries of investment especially in Latin America, he is under an express prohibition to enlist.[1]

This dilemma has led to the suggestion that alternative recourse be provided for such disputes before an international arbitral body. Arbitration has increasingly become a favoured method for resolving disputes arising in business relations. Such recourse has been extended to the relations between private enterprises and state trading agencies. The Economic and Social Council in its resolution 708 (XXVII) of 17 April 1959 recommended increased resort to arbitration for private law disputes.[2] In fact, in a number of countries governments have accepted, either in individual concession agreements or in general investment laws, that disputes with foreign investors be decided by arbitral bodies.[3] Even then the promise to arbitrate may be felt to afford insufficient assurance, since unwillingness of the government to proceed to arbitration in a given case

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* The Promotion of the International Flow of Private Capital. Progress Report by the Secretary-General, of February 26, 1960, U.N. DOC. E/3325 p. 76.

1. This prohibition generally takes the form of the Calvo-Clause, under which foreign enterprises must submit to local laws and tribunals and renounce all claims to the diplomatic protection of their home government. (See "Status of Permanent Sovereignty over Natural Wealth and Resources", Document A/AC.97/5, Chapter I, paragraphs 56-61, 154).
2. This subject has received considerable attention in the United Nations which culminated in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. The Regional Economic Commissions for Europe and for Asia and the Far East also are active in this field.
3. Thus, e.g. the Law on Investment and Protection of Foreign Capital in Greece provides for the settlement of disputes, arising under the terms of the instrument of approval (issued for each investment), by arbitra-

may leave the investor without effective redress. A few laws and concessions, especially in the petroleum field, have, therefore, sought to make the arbitration clause substantially self-executing by conferring upon an independent neutral authority the power to appoint arbitrators and umpires in case of need.[4]

As a more general solution to the problem, it has been proposed to include the arbitral agreement in an international treaty so as to transform the government's promise into a clearly enforceable obligation of international law.[5] Foremost among the proposals along these lines are precisely investment charters which provide for the settlement of disputes, arising under their terms, exclusively or alternatively by arbitration.[6]

In view of the doubts regarding the practicality of these charters, an alternative would be to limit the international agreement to the

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tion and expressly permits the appointment of a foreign umpire; arbitration, at least for disputes over compensation in case of nationalization, is also provided in the Law Encouraging the Investment of Private Foreign Capital in Afghanistan.

4. Thus the Libyan Petroleum Law confers this power upon the President of the International Court of Justice. The Bolivian Petroleum Code makes such provision only for disputes on technical and accounting matters, in which case the Chairman of the Petroleum Section of the American Institute of Mining, Metallurgical and Petroleum Engineers is to make the appointment. The concession agreements between the National Iranian Oil Company and the so-called International Consortium, between Iraq and the Iraq Petroleum Company, between Saudi Arabia and the Japan Petroleum Company and between Kuwait and the Arabian Oil Company, also assign the appointing power to the President of the International Court of Justice. The Iranian concession in addition lists the Presidents of the Swiss Federal Tribunal and of the Supreme Courts of Denmark, Sweden and Brazil as alternative appointing agencies; in disputes on technical or accounting questions, however, the Heads of the appropriate technical institutes in Zurich are to have the appointing power. The concession agreement between the National Iranian Oil Corporation and AGIP Mineraria (Italy) also assigns the role of appointing authority to different agencies for different types of disputes, among them the Managing Director of the International Monetary Fund for disputes involving currency and exchange matters.
5. See e.g. the United States and German agreements in support of their guarantee insurance schemes.
6. The draft Charter submitted by the Swiss government to the Organization for European Economic Co-operation contemplates the establishment of a special Arbitral Tribunal, as does the draft Code of the International Chamber of Commerce. The revised Charter sponsored by the Government of the Federal Republic of Germany contains a special Annex on the Arbitral Tribunal, which confers the power of appointment upon the President of the International Court of Justice or the Secretary-General of the United Nations.

acceptance of international arbitration as a means of resolving disputes between foreign investors and governments of investment countries. Many among the persons consulted who were in favour of an investment charter expressed interest in an independent arbitration agreement, at least as an intermediary solution. In fact the latter might provide broader protection than the investment charters: while the protection of an investment charter would normally be limited to the specific rules of conduct which the parties had agreed to include in it, an international arbitration agreement might conceivably be made to cover all disputes arising in connection with the treatment and operations of foreign investors.

The fact that the rules and principles which would guide the arbitrators would not be specifically set out in the underlying arbitration agreements should not militate against their acceptance: thus the Exchange of Notes, signed by the United States Government in support of its guarantee insurance scheme, provide for arbitration of disputes arising from the nationalization of foreign investments or the imposition of currency restrictions without formulating the governing rules of law.

The issue, whether the investor himself would be accepted as a proper party or would have to be represented by his goverment, will pose a separate problem. While the investor's access to his government's sponsorship should be easier, where it is expressly contemplated under an international treaty, the ability to sue in his own name and on his own authority would greatly enhance the value of the agreement to him. Moreover, governments of capital-receiving countries which are apprehensive of the intervention of foreign governments in disputes with foreign investors might well prefer arbitration agreements under which the latter remain the active party in interest throughout the proceedings. In fact this possibility is contemplated by the above-mentioned draft investment charter presented by the Federal Republic of Germany to the Organization for European Economic Co-operation and—though in a limited case only—under the International Chamber of Commerce draft code, and of course under those investment laws and concession agreements which provide for arbitration.

Where a government has different policies vis-à-vis investments from different capital-supplying countries, bilateral instruments might offer a more acceptable solution than multilateral agreements. Indeed the latter may conceivably develop from the emergence of a

growing network of bilateral agreements or within the framework of a regional organization. Such agreements might vary widely in their scope: they could be made applicable either to all investment moving between the two countries, or to those investments only which had been approved by both governments for the purposes of this protection (as in the case of the United States investment guarantee agreements). As an important initial step, the agreement might be limited to providing the procedure for the appointment and conduct of arbitrators in the case of those disputes which the governments (or one government and the aggrieved investor) would agree to arbitrate, as they arose. Guidance may here be sought from existing arbitration provisions, e.g. in some laws and concession agreements, as well as in the instruments signed between international financial institutions (e.g. the International Bank for Reconstruction and Development)[7] and governments.

Much emphasis was placed by many of the persons interviewed by the Secretariat on the establishment of a suitable arbitration agency or centre as a condition precedent for the acceptability of arbitration to government and investors. There are at present many highly reputable national and international arbitral bodies in existence in the private law field. Foremost among the latter is the Court of Arbitration of the International Chamber of Commerce, the American Arbitration Association and the Inter-American Commercial Arbitration Commission. While these have been used in commercial disputes between government bodies and private parties, a separate arbitral body not identified with a commercial approach might be more readily acceptable to the governments of some capital-receiving countries in matters involving the rights and assets of foreign investors. This view would tend to favour a special arbitration tribunal or panel, of oustanding neutrality and expertise, perhaps under the United Nations auspices, with members drawn from both capital-supplying and capital-receiving countries possibly on a regional basis. While the structure and operation of such an arbitration agency would raise a series of questions (relating e.g. to the identity of the appointing bodies, the terms and qualifications of the arbitrators, the organ-

7. The Bank's Loan Regulations which have been incorporated by reference in its Loan Agreements make detailed arrangements for arbitration including a provision for the appointment of the Umpire, in case of need, by the President of the International Court of Justice or the Secretary-General of the United Nations.

ization of a permanent centre, its possible relationship with existing arbitral bodies), these questions do not appear to be in the nature of intractable difficulties.

Once such an arbitration agency was established, its very availability might encourage governments to commit themselves to arbitration (even in the absence of an inter-governmental agreement) either as a special concession to favoured investments, or merely as a last recourse in specific disputes, as they arose. If such an agency were able to achieve a wide practice and prestige, it might in time become the natural fulcrum for the conclusion of bilateral, and possibly multilateral, agreements between governments on foreign private investments.

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United States Arbitration Act—Stay of Proceedings—Declaration of National Law—Fraud as an Arbitrable Issue [*Robert Lawrence Co. v. Devonshire Fabrics*, 271 F. 2d 402], 1 Boston College Industrial and Commercial L. Rev. 318-321 (1960).

(*Continued from Page* 50)

In present day labor-management arbitration, both sides know that two of the arbitrators are going to be partisans, if not outright advocates, and when they agree to proceed with such an arrangement aren't they in truth and in fact waiving any objection thereto? Many a court has held that a person has waived some right on less convincing evidence than this. I believe most courts, if they know the facts of life in arbitration or are apprised of them would hold in case of a belated objection by a loser that his full knowledge and acquiescence to these facts amounted to a waiver of any right to object.

As for the oath, there probably are a few states where the statutory requirement as to the arbitrator's oath is mandatory and where the courts construe it as a prerequisite to an enforceable award, statutory or common law.[4]

In a great majority of states there is a practical way to handle the matter, I believe, even without change in law. Let us assume that the union, for example, wants to meet this problem head-on, wants to be realistic and legally correct and sure of a legally enforceable award. It would do well then, in my opinion, to bring the whole matter up at the opening of the arbitration hearing and point out the partisan status of the two arbitrators, point out that this is a commonly accepted procedure in labor-management arbitration and ask the spokesman for the company if he would like to agree on Stipulation "A" or "B" as discussed above. The matter is surely then out on the table, aboveboard and recognized for what it is. No matter which answer the company should give, yes, or no, the company then would hardly be in a position, after losing the arbitration case, to complain about the partisan status of two arbitrators. If the company spokesman insisted on the swearing of the party-appointed arbitrator then they would need to be sworn in those few states where the statutory requirements as to arbitrator's oath is mandatory and where the courts construe it as a prerequisite to an enforceable award. The strategy should work just as well when the company takes the initiative in this manner as when the union does.

4. For example, Louisiana. See Benjamine Co. v. Royal Mfg. Co., 172 La. 965 (1931).

I would agree that the American Arbitration Association rules should also be changed to omit the requirement of an oath by the two party-appointed arbitrators, except in those states where the parties are required to follow or desire to follow a statutory procedure which includes the oath.

Solomon Barkin
Director of Research, Textile Workers Union of America, AFL-CIO

I am moved to write immediately on your editorial in order to offer you my basic suggestions. It would be desirable for me to prepare a full and mature document but I shall have to postpone that effort to a later date and an occasion for formal argument.

My basic suggestion for dealing with the tri-partite arbitration is to recognize it as a real alternative and not attempt to sidetrack and to destroy it. Fundamentally I believe it is a most desirable approach to the arbitration process. In no small part, the AAA is responsible for part of the disfavor in which it has fallen. The current generation of arbitrators and lawyers has become so legalistically oriented that they have subordinated the basic purpose of the arbitration process in many instances—which is to promote another form of collective bargaining. It is my belief that the legislative process continues long after the adoption of a contract. Political scientists are becoming more cognizant of the fact that administration is itself a process of law making. Even the judicial process is an extension of the law making procedure. Therefore it is entirely reasonable and proper for the collective bargaining process, which is the effort at reconciling different decision making authorities, to continue through the arbitration procedure.

I would therefore urge a frank acceptance of the tri-partite process for what it is: an extension of the bargaining process; and seek recognition for it in the laws and courts. The oaths should therefore be revised.

If there is an occasion for formal argument and presentation I shall gladly prepare a more "learned" offering of this view.

I believe that David Cole has performed a real service in bringing this issue to the fore and I am happy that the AAA is ready again to approach this problem frankly and with an open mind.

Isador Lubin
Professor of Public Affairs, Rutgers University

This note is merely to compliment you on the editorial in the current number of the Arbitration Journal on "The Dilemna of Tri-Partite Arbitration". I read it with a great deal of interest and I do hope that it will be possible to keep this problem in the forefront of discussion among the profession.

I had a most interesting experience in Philadelphia recently when I was appointed as the neutral impartial arbitrator in a case that involved the Philadelphia Transit Co. and the Transport Workers. The employer representative was a company official who was put on the stand as a witness to testify that the company was justified in the charges that it brought against the individual employee. I raised the question of having an "arbitrator" testifying in behalf of one of the parties and was informed that this is not uncommon in cases involving the Transit Company. I must say that the spectacle of seeing the Union appointee on the Arbitration Board cross-examining the employer appointee raised serious doubts in my mind as to the validity of the concept of tri-partite arbitration.

Evidently the agreement under which the arbitration was held makes such a procedure possible and there was nothing that I could do about it.

John M. Maguire
Director of Services, Union Relations Department
The Detroit Edison Company

During the first few years of arbitration under agreements with two local unions, we had tripartite boards of arbitration. It seemed to the parties (as stated in the editorial) that the "company" and "union" arbitrators were, in fact, advocates and could not impartially arbitrate the issues. Nevertheless, both parties believed that their representatives on the board served a useful purpose in keeping the arbitrator from unwitting mistakes of evaluating facts and keeping him from making some error due to his unfamiliarity with the peculiarity of our industry and area.

Accordingly, both local unions (Local 223 of the Utility Workers

Union of America and Local 17 of the International Brotherhood of Electrical Workers) agreed with the company a few years ago that each party would appoint an advisor to the arbitrator on any arbitration matter. These advisors serve the parties as advocates. The arbitrator is free, however, of any necessity to compromise his findings in order to achieve a majority decision. In the company's opinion (and, we believe, in the union's too), our particular method has worked well. It provides adequate representation on the board of arbitration without encumbering the arbitrator with endless discussion and mediation efforts to achieve a majority decision.

Louis Furth

Chairman, Arbitration Supervision Board
American Spice Trade Association

Your editorial on "The Dilemma of Tri-Partite Arbitration" and your invitation to comment on it, prompts this letter.

Four years ago the American Spice Trade Association abolished the Tri-Partite System and introduced a different method of selecting arbitrators. My remarks are based entirely on commercial arbitrations as I was not involved, nor am I familiar with labor disputes.

As you stated correctly, *"arbitration is an institution designed to serve the needs of the parties,"* not the other way around. Therefore, if it is a private affair, whatever the parties agree upon suits them well. When each selects an arbitrator who might become an advocate, and the two select a third arbitrator, the parties are evenly represented. The case is different, however, when the Tri-Partite system is the established procedure of an association because besides the two parties, the association too is an interested party.

The reputation of having a clean, impartial arbitration system is at stake. This must be defended.

Arbitrators selected by the parties, often called advocates, are accused of partiality. There are arbitrators who will not discuss the case with any of the parties. It happened many times that such an arbitrator voted against the party by whom he was selected. Unfortunately, this kind of an arbitration is rare. It became a practice that a party discussed his case with "his" arbitrator, followed his advice and often such arbitrators acted as advocates without the

ethical restrictions of a lawyer. Yet impartiality is a basic requirement of any arbitration.

The American Spice Trade Association now has an elected body called the A.S.B. which, as the case may be, submits to the parties a panel of 15 names. The parties return the panel, marking their preference and also their dislikes. Thereafter the A.S.B. selects, entirely *in its discretion,* a chairman and two arbitrators. Moreover, it is requested that the arbitrators, at the beginning of the hearing, shall disclose anything that might reflect on their impartiality.

In my opinion, an impartial arbitration depends on the integrity of the arbitrators. Strengthening the law or the rules would not raise the moral standard of the arbitrators but open new ways to fight an award in the courts.

Contrary to judges, arbitrators have more freedom in finding a just and fair solution. Seldom is one party 100% wrong. Most of the awards, as all actions where democratic principles prevail, are based on compromise. Arbitrators have their limitations and one man is more likely to err than three men would.

This is why I prefer recommendation numbered one, which puts the emphasis on the quality of the arbitrators. To act as an arbitrator is an honorary job. Appeal to the honor of the arbitrators; train them, educate them, raise their moral standard and you will have clean, impartial arbitration.

REVIEW OF COURT DECISIONS

THIS review covers decisions in civil, commercial and labor-management cases, arranged under six headings: I. *The Arbitration Clause,* II. *The Arbitrable Issue,* III. *The Enforcement of Arbitration Agreements,* IV. *The Arbitrator,* V. *The Proceedings,* VI. *The Award.*

I. THE ARBITRATION CLAUSE

UPON MERGER OF ARBITRATION AGENCIES, THE RULES OF THE LAWFUL SUCCESSOR APPLY TO CONTRACTS CALLING FOR ARBITRATION ACCORDING TO THE RULES OF THE MERGED AGENCY. The contract called for arbitration according to the rules of the National Federation of Textiles. This group was consolidated with the American Cotton Manufacturers Institute, Inc., which adopted the arbitration rules of the Federation. The "Institute" then consolidated with the General Arbitration Council of the Textile Industry. The court, considering the "Council" the lawful successor to the "Federation", said that "there is no valid reason advanced why the arbitration should not proceed pursuant to its rules." The court therefore denied a motion to stay arbitration. *Leon of Paris v. Grace Fabrics,* N.Y.L.J., Feb. 17, 1960, p. 13 (Spector, J.).

CONSTRUCTION CONTRACT GIVING ARCHITECT RIGHT TO DETERMINE ALL QUESTIONS RELATING TO WORK AND MATERIALS PRECLUDED ARBITRATION. The contract provided that all questions subject to arbitration under the contract shall be submitted to arbitration, but did not list any matters as subject to arbitration. The contractor claimed that certain conditions in connection with the work which the architect asserted required repair within the one-year period were the fault of the architect. The court stated that interpreting the terms of the contract so that any dispute arising between the contractor and the architect would be subject to arbitration, would be to nullify completely those sections of the contract where "it is agreed that the architect's word and decision shall be final." *In re Incorporated Village of Valley Stream,* 196 N.Y.S. 2d 377 (Nassau County, Edward Robinson, Jr., J.).

STAY OF ARBITRATION DENIED DESPITE FACT THAT ARBITRATION AGREEMENT HAD TERMINATED. The court, referring to the leading case of *Potoker v. Brooklyn Eagle,* 2 N.Y. 2d 533, rearg. den. 3 N.Y. 2d 887, held that "matters still remain subject to arbitration under the contract regardless of when the employees were discharged or the fact that the term of the collective agreement has expired." *Banff, Ltd. v. Livingston,* N.Y.L.J., Feb. 24, 1960, p. 13 (Matthew M. Levy, J.).

VALIDITY OF SUPPLEMENTAL AGREEMENT TO MAIN CONTRACT WHICH WOULD DEPRIVE PARTY OF ARBITRATION IS FOR THE COURT TO DETERMINE AND NOT THE ARBITRATORS. The court considered this question as a preliminary issue, for if the second agreement never came into being, the union would be entitled to arbitration. In two dissenting opinions it was stated that the issue should have been left to the determination of the arbitrators, relying on the decision in *Carey v. Westinghouse Electric Corp.*, 6 App. Div. 2d 582, 583, 180 N.Y.S. 2d 203, 205, aff'd 6 N.Y. 2d 934, 190 N.Y.S. 2d 1003, which held that on a motion to compel arbitration the court may only consider the existence of an agreement to arbitrate and whether there is a dispute arising thereunder. *Gallagher v. Esso Standard Oil Co.*, 10 App. Div. 2d 22, 196 N.Y.S. 2d 524 (First Dept.).

THE ARBITRATION CLAUSE IS A SEPARABLE PART OF THE MAIN CONTRACT. Referring to the recent decision in *Robert Lawrence Co. v. Devonshire Fabrics*, 271 F. 2d 402 (digested in *Arb. J.* 1959 p. 209), the court found that this prior decision "construed the [Federal] Arbitration Act as envisaging the arbitration clause as a separable part of the contract . . ." This meant that any lack of meeting of the minds as to the main body of the contract would not upset any arbitration clause which was part of the agreement. "Since this clause is separable and provides for unrestricted submission, the question of a meeting of the minds as to double rigging is within the province of arbitration." *Amicizia Societa Nav. v. Chilean Nitrate & Iodine Sales Corp.*, 274 F. 2d 805 (2d Cir., Clark, C. J.).

WILLINGNESS TO ARBITRATE SOME DISPUTES DOES NOT BIND PARTY TO ARBITRATE ALL OTHER DISPUTES MERELY BECAUSE OF THE GENERAL IDENTITY OF THE ISSUES INVOLVED. The documents relating to a loan and collateral arrangement between the parties were carefully drafted and contained no reference to any arbitration of disputes. At some later time the same parties entered into a joint venture which contained an agreement to arbitrate. That document made no reference to the earlier arrangement and a dispute arose concerning the joint venture. The court said: "Since the instant dispute arises out of the loan agreement, it cannot be deemed arbitrable under the stockholders agreement." Accordingly, a motion to stay arbitration was granted. *Renis Fabrics Corp. v. Millworth Converting Corp.*, N.Y.L.J., April 6, 1960, p. 13 (Nathan, J.).

ARBITRATION AGREEMENT ADDED TO BY-LAWS OF AN ASSOCIATION HELD BINDING ON ALL MEMBERS even though there was no provision in the by-laws for arbitrating disputes at the time they became members of the association. Notice of the revision of the by-laws was given to all the members and the petitioners failed to protest the revision or the inclusion of the arbitration agreement. Where they had the opportunity and adequate notice, their failure to object to the new by-laws did not make a nullity of them and they were bound by its provisions. In effect, the silence of the parties made them bound to an arbitration agreement. *Mandel v. Hollowbrook Lake Ass'n., Inc.*, N.Y.L.J., March 30, 1960, p. 13 (Steuer, J.).

EMPLOYMENT CONTRACT MUST CONTAIN AGREEMENT TO ARBITRATE IN ORDER TO COMPEL ARBITRATION OF WRONGFUL DISCHARGE. The fact that the employee signed an application for approval of employment which contained a statement that the employee pledged himself to abide by the Constitution and Rules of the Board of Governors of the New York Stock Exchange, and one of such rules requires arbitration of any dispute arising out of the employment, is not sufficient. "Absent any reference to arbitration in the application or in the employment agreement," the employee in undertaking the employment did not give his assent to any provision for arbitration of disputes. *Drachman & Co. v. Wulwick,* 20 Misc. 2d 912, 195 N.Y.S. 2d 399 (Spector, J.).

ORAL EXTENSION OF A WRITTEN EMPLOYMENT CONTRACT HELD SUFFICIENT TO SATISFY REQUIREMENT THAT ARBITRATION AGREEMENT BE IN WRITING. By orally renewing the written agreement the parties in effect adopted it as an integral part of the new arrangement, modified only by an extension of the time of employment. In reversing the Appellate Division's ruling (digested in *Arb. J.* 1959 p. 201), the New York Court of Appeals said: "No other logical meaning can be attached to the expression 'oral renewal' . . . There was, therefore, a sufficient compliance with section 1449 of the Civil Practice Act, which requires 'A contract to arbitrate a controversy thereafter arising between the parties must be in writing.' It was not necessary for the parties to prepare a new written agreement since they bound themselves to the old one, nor was it necessary for them to sign a new agreement." *Acadia Co. v. Edlitz,* 7 N.Y. 2d 348, 197 N.Y.S. 2d 457.

II. THE ARBITRABLE ISSUE

THE 1959 LABOR REFORM ACT DOES NOT GIVE THE RIGHT TO ONE DISCHARGED EMPLOYEE TO SUE HIS UNION IN THE FEDERAL DISTRICT COURT FOR ALLEGED FAILURE TO PROSECUTE HIS GRIEVANCE AGAINST THE EMPLOYER UNDER THE TERMS OF THE COLLECTIVE BARGAINING AGREEMENT. *Allen v. Teamsters Local* 820, U.S. D.C. New Jersey, April 6, 1960, 28 U.S. Law Week 2513 (Hartshorne, J.).

WHETHER EMPLOYER MAY SUBCONTRACT WORK IS NOT ARBITRABLE WHERE COLLECTIVE BARGAINING AGREEMENT CONTAINED NO PROVISION AGAINST SUBCONTRACTING. The court stayed arbitration despite the union's contention that subcontracting violated a provision stating that the contract "shall not be deemed to impair any conditions of employment more beneficial to the employees than those provided herein." The union "failed to state [its] grievance in detail or to furnish any specifics as to the farmed out work." On the other hand, the employer "relates the facts and circumstances in such abundant and persuasive detail as to compel the conclusion that no bona fide arbitrable issue exists." *Crivelli v. University Loudspeakers,* 20 Misc. 2d 292, 195 N.Y.S. 2d 393 (Conlon, J.).

DISPUTE OVER WHETHER THE CONTRACTOR WAS PREVENTED FROM PERFORMING HIS OBLIGATIONS, WHETHER THE OWNER WAS RESPONSIBLE FOR DELAYS, AND WHETHER THE DEMAND FOR ARBITRATION WAS TIMELY ARE "EXCLUSIVELY IN THE PROVINCE OF THE ARBITRATORS." The Appellate Division affirmed the decision digested in the *Arb. J.* 1959 p. 102. *Thornton Street Realty Co. v. B. J. Lucarelli & Co.*, 10 App. Div. 2d 565 (First Dept.).

DISPUTE OVER ASSIGNMENT OF WORK HELD NOT ARBITRABLE UNDER CLAUSE LIMITING ARBITRATION PROCEDURE TO "THE APPLICATION AND INTERPRETATION OF ANY PROVISION OF THIS AGREEMENT AS TO HOURS, WAGES OR WORKING CONDITIONS." The dispute involved the assignment of work to employees designated as "servicemen." Respondents claimed that servicemen were being required to perform work which had usually been done by non-mechanical employees in a lower wage classification. The court held that such a dispute does not come within the scope of the above quoted provisions of the collective bargaining agreement. *Royal McBee Corp. v. Gough,* N.Y.L.J., Jan. 17, 1959, p. 13 (Gallagher, J.).

IN DETERMINING WHETHER LEASING AGREEMENT BY EMPLOYER PRESENTED AN ARBITRABLE ISSUE, COURT MAY INQUIRE INTO THE BONA FIDES OF THE TRANSACTION. The trial court refused to compel arbitration, holding a leasing arrangement not within the terms of the collective bargaining agreement (digested in *Arb. J.* 1959, p. 99). The Court of Appeals, however, stated that a true leasing agreement would be within the permissible scope of management's prerogatives to discharge employees and substitute leasing arrangements. The union contended that the leasing agreements were mere subterfuges for evading the bargaining contract. The case was remanded for determination of the "underlying purposes and legal effect of the leasing agreements," even though the collective bargaining agreement had expired during the court litigation. *United Steelworkers of America, AFL-CIO, Local Union No.* 4264 *v. New Park Mining Co.*, 273 F. 2d 352 (U.S. Court of Appeals, 10th Cir.).

WHETHER ADVERSE ECONOMIC CONDITIONS EXIST SO AS TO AFFECT EMPLOYER'S BUSINESS TO THE EXTENT OF REDUCING HIS BASIC WORK CREW, IS FOR THE ARBITRATOR. A contract provided that the employer had to obtain the consent of the union before making any changes in the basic crew and that said consent would not unreasonably be withheld if economic or business conditions warranted it. The employer claimed that business conditions were so clearly known to be adverse that the union in good faith could not make any other determination than that the crew reduction was justified. Said the court: "The question here is whether there is an arbitrable issue, and if there is, then the petitioner could not unilaterally decide the measure and form of relief it was entitled to, nor could the court do so, but same must be decided by the arbitrators as provided for in the contract." *Russeks Fifth Avenue v. Wagner,* 197 N.Y.S. 2d 965 (Martuscello, J.).

A PROCEEDING TO STAY ARBITRATION ON GROUNDS OF NON-ARBITRABILITY IS NOT A SUIT FOR VIOLATION OF THE CONTRACT. It is a suit involving the construction of the contract and therefore is not removable to the federal courts on the ground of Sec. 301 (a) of the Labor Management Relations Act, which allows suits for violations of contracts between employers and labor unions to be brought in any district court of the United States. *Wamsutta Mills v. Pollock,* 180 F. Supp. 826 (S.D. N.Y., Dimock, D. J.)

DISCHARGE OF MAGAZINE SPACE SALESMAN WAS NOT ARBITRABLE WHERE EMPLOYMENT CONTRACT GAVE EMPLOYER RIGHT TO DISCONTINUE PUBLICATION WITHOUT INVOLVING THE EMPLOYER IN LIABILITY FOR DAMAGES RESULTING FROM SUCH DISCONTINUANCE. The Court of Appeals affirmed an order which stayed arbitration (digested in *Arb. J.* 1959 p. 203). *Rapid-American Corp. v. Quinn,* 7 N.Y. 2d 891.

DISPUTES OVER ALLEGED DELAYS AND EXTRA WORK HELD ARBITRABLE UNDER BROAD ARBITRATION CLAUSE RELATING TO "PERFORMANCE, NON-PERFORMANCE, DEFAULT, COMPLIANCE OR NON-COMPLIANCE." The court referred to the recent decision in *Robert Lawrence Co. v. Devonshire Fabrics,* 271 F. 2d 402 (2d Cir. 1959), which expounded the doctrine that "once jurisdiction over both subject matter and the parties is established, all questions relating to the validity, enforcement and interpretation of the arbitration clause of a contract, are to be governed by federal rather than local law, i.e. the Federal Arbitration Act, and that the Act was to be given a liberal interpretation." In granting a motion to compel arbitration, the court said: "There is nothing to indicate that the specific issues in dispute do not fall within the broad categories . . . set forth in the arbitration clause." Any state law cases to the contrary were distinguished as not controlling, since federal law now applies to this area of arbitration law. *Metro Industrial Painting Corp. v. Terminal Const. Co.,* 181 F. Supp. 130 (S.D. N.Y.).

III. THE ENFORCEMENT OF ARBITRATION AGREEMENTS

REQUIREMENT OF WRITTEN CLAIM OF CONTRACTOR, TO BE FILED WITH BOARD OF EDUCATION WITHIN THREE MONTHS AFTER THE ACCRUAL OF THE CLAIM, APPLIES TO ARBITRATION, so that arbitration may not be commenced against the Board of Education if the necessary statutory prerequisite is not complied with. Said the court: "In the light of the language adopted by the Legislature, broad and unlimited as it is, there is no warrant for saying that the salutary purpose of section 3813 of the Education Law—to give a school district prompt notice of claims 'so that investigation may be made before it is too late for investigation to be efficient'—applies any less to arbitration of claims asserted against a school district than to actions brought against it." *Board of Education, Union Free School Dist. No. 7 v. Heckler Electric Co.,* 20 Misc. 2d 1030; reversed 8 App. Div. 2d 940, aff'd 7 N.Y. 2d 476.

DISPUTE OVER ALLEGED BREACH OF CONTRACT BY SELLER OF A LIBERTY SHIP HELD TO BE A CONTROVERSY "WHICH MAY BE THE SUBJECT OF AN ACTION" (N.Y. CIVIL PRACTICE ACT, SEC. 1448). In affirming the Special Term ruling (digested in *Arb. J.* 1959 p. 100), the court said: "It is now well-settled law that there may be remedies in arbitration which would not have been available in a court within conventional actions or proceedings at law or in equity . . . There is a litigation risk in arbitration, as there is in the courts. Nor are the courts endowed with a power of censorship of arbitration proceedings to make certain that arbitrators will resolve the facts and the issues before them in the same manner that the courts believe they would have done. Nor are the arbitrators bound to exercise their powers in the mold of the forms of action or in the tradition of the chancellor. Indeed, one of the several purposes of arbitration is that the parties select, instead of the courts, their own 'judges' and a mode of dispute determination not governed either by the rules of substantive law or the rules of evidence which obtain in the courts." *Transpacific Transport Corp. v. Sirena Shipping Co., S.A.*, 9 App. Div. 2d 316, 193 N.Y.S. 2d 277 (Breitel, J.P.).

CONTRACT PROVISION THAT FAILURE TO OBJECT TO FINANCIAL STATEMENT WITHIN CERTAIN TIME LIMIT MAKES STATEMENT "BINDING AND CONCLUSIVE ON BOTH PARTIES" MEANS THAT THERE IS NO ISSUE LEFT TO BE BROUGHT TO ARBITRATION CONCERNING ITS CORRECTNESS. When the parties in no way objected to the financial statement and affirmatively agreed to and accepted it, the prior agreement of necessity modified the arbitration clause to the effect that it settled the dispute so that there was no furher need for any arbitration. *Morgan Guaranty Trust Co. of N.Y. v. Wasserman*, 21 Misc. 2d 438 (Levy, J.); reversed 10 App. Div. 2d 278.

RIGHT TO DEMAND ARBITRATION IS BARRED BY FAILURE TO GIVE REQUIRED NOTICE WITHIN TIME PRESCRIBED BY AGREEMENT. In staying arbitration, the court held that a provision in the collective bargaining agreement that notice must be given the employer within three days of discharge of an employee in order to appeal the discharge, was, in effect, a short Statute of Limitations. Failure to comply with its terms, unless waived, is a bar to arbitration. *Ketchum & Co. v. Allied Trades Council*, 20 Misc. 2d 736 (Eder, J.).

FAILURE TO DEMAND ARBITRATION WITHIN THE TIME LIMITS SPECIFIED BY THE CONTRACT WILL BAR ARBITRATION. The employer admitted that he did not comply with the procedural requirements of the collective bargaining agreement, but alleged that they were permissive and not mandatory. The court said: "This contradicts the plain language of the agreement which clearly makes adherence to the procedural requirements of the contract a condition precedent to arbitration as of right." *Office Employees Int'l Union, Local* 153, *AFL-CIO v. Piel Bros.*, N.Y.L.J., March 25, 1960, p. 12 (Nathan, J.).

REQUESTING ADDITIONAL TIME TO ANSWER AND THE MERE LATER FILING OF AN ANSWER IN A COURT ACTION ARE NOT SUFFICIENT TO CONSTITUTE A WAIVER OF THE RIGHT TO ARBITRATION. This is all the more true when immediately prior to the filing of their answer, defendants petitioned for an order staying the proceeding until arbitration be had. *United States v. Al-Con Development Corp.*, 271 F. 2d 904 (Fourth Cir., Boreman, J.).

FAILURE TO INITIATE PRE-ARBITRATION PROCEDURES DOES NOT BAR A STAY OF A LAWSUIT. When claimant sought court action over a dispute concerning a building contract, the respondent moved for a stay of proceedings pending arbitration. Said the court: "The right to stay the action is not waived by petitioner's failure to request the architect to decide the controversy or to demand arbitration. It is respondent's obligation under the contract to initiate the preliminary steps to arbitration rather than to institute an action on its claim." *Cummings v. Walmar Builders*, N.Y.L.J., April 5, 1960, p. 13 (Nathan, J.).

WHERE COURT CAN FIND CONDUCT OF TRUSTEE MAKES HER UNSUITABLE TO EXECUTE THE TRUST UNDER A WILL, NO STAY OF REMOVAL PROCEEDINGS BY LIFE BENEFICIARY WILL BE GRANTED PENDING ARBITRATION OF THE PROPER DISTRIBUTION OF ASSETS. The court assumed, without deciding, that a fiduciary such as a trustee could properly enter into an agreement providing for the arbitration of disputes between the executrix and other directors of a corporation, but said that "the results of any arbitration . . . would be of no significance" in an action to remove the trustee for improper conduct. *In re Fales' Estate*, 195 N.Y.S. 2d 466 (Nassau County, Bennett, Surr.).

WHETHER SUBSIDIARY CORPORATION HAD TO CONTINUE SAME HIRING POLICY WHERE PRODUCTS SOLD ARE THOSE OF THE SUBSIDIARY IS FOR THE ARBITRATORS AND NOT THE COURTS TO DECIDE. Stating the general rule that "where it is shown that an agreement to arbitrate exists and broad and comprehensive language is employed in the arbitration clause, it is implicit therein that the parties intended to reserve for arbitration any controversies involving the interpretation or application of the provisions of the agreement or of any breach thereof," the court granted a motion to compel arbitration. *Maher v. Francis H. Leggett & Co.*, 197 N.Y.S. 2d 609 (Schwartzwald, J.).

DEMAND FOR ARBITRATION IN DISPUTE OVER ALTERCATION BETWEEN SUPERINTENDENT AND EMPLOYEE was considered sufficiently broad to "permit the arbitrators to fashion an appropriate remedy. . . . Whether or not the arbitrators, in making such award, will have exceeded the scope of their powers under the agreement, can and should be properly determined, if necessary, after its rendition." Therefore a lower court order denying a stay of arbitration was affirmed. *Continental Baking Co. v. Genuth*, 10 App. Div. 2d 617, 196 N.Y.S. 2d 320 (First Dept.).

ARBITRATION STAYED WHERE CLAIMANT HAS A PRIOR LAW-SUIT PENDING AGAINST AN UNINSURED MOTORIST. The statute creating the Motor Vehicle Accident Indemnification Corp. (Art. 17A of the Insurance Law, Laws of 1958, c. 759) provides that it cannot negotiate the settlement of a claim where an action is pending. The court considered that settlement by arbitration amounts to such limitation as the statute envisaged, and therefore held the arbitration provision in the policy inoperative, as an action was pending. *Motor Vehicle Accident Indemnification Corp. v. Koenig*, N.Y.L.J., March 21, 1960, p. 15 (Hogan, J.).

ARBITRATION WILL BE STAYED WHERE THE DEMAND FAILS TO SHOW THE SPECIFIC ISSUES TO BE ARBITRATED. The demand was inadequate in asking for specific performance of the contract without indicating what provisions were sought to be enforced and without specifying the nature of the breach or whether the dispute was arbitrable under the contract. The court, stating that the petitioners were not apprised of the specific issues to be arbitrated and could therefore not be expected to proceed to arbitration, granted a motion to stay arbitration "without prejudice to respondents' right to serve a proper notice to arbitrate which shall adequately state the specific controversies sought to be arbitrated." *Unipak Aviation Corp. v. Mantell*, 20 Misc. 2d 1078, 196 N.Y.S. 2d 126 (Jacob Markowitz, J.).

FEDERAL COURT HOLDS EMPLOYEES MUST EXHAUST ADMINISTRATIVE REMEDIES PROVIDED FOR IN EMPLOYMENT CONTRACT BEFORE THEY MAY RESORT TO THE COURTS. The Interstate Commerce Commission was required by federal statute to make provisions for the protection of employees adversely affected by the merger of railroads. One of the provisions of the rules of the Commission was that any controversy "may" be submitted to arbitration. Although it was not necessary to rule on the meaning of the phrase "may" be, the court said: "While the Commission has provided that disputes 'may' be submitted to arbitration . . . the provisions made by the Commission for arbitration are mandatory and not permissive." *Arnold v. Louisville & Nashville R.R. Co.*, 180 F. Supp. 429 (M.D. Tenn.).

MOTION FOR STAY OF ARBITRATION TREATED AS PROCEEDING SEPARATE FROM ANY PRIOR OR SUBSEQUENT APPLICATIONS TO COURT BY PARTIES TO DISPUTE. The New York Supreme Court, in construing a collective bargaining agreement which was negotiated and executed in Massachusetts and was to apply to workers in a Massachusetts mill, and which further contained no reference to New York law or to having arbitration in New York, looked to Massachusetts law to determine when removal to federal courts is allowed. Since there was "no contention that Massachusetts law treats multiple steps in an arbitration proceeding as part of one proceeding in court, [the employer's] motion for a stay was a proceeding separate from any prior or subsequent applications to a court by either party to the dispute." *Wamsutta Mills v. Pollock*, 180 F. Supp. 826 (S.D. N.Y., Dimock, D. J.).

FEDERAL COURT ORDER REFUSING TO STAY ARBITRATION WAS NOT APPEALABLE and hence a motion for a stay pending the appeal was denied, as moot, in a dispute concerning a collective bargaining agreement then directly pending in arbitration and about to be heard. ***Greenstein v. National Skirt & Sportswear Ass'n,*** 274 F. 2d 430.

FAILURE TO COMPLY WITH PROCEDURES ESTABLISHED IN THE AGREEMENT FOR THE PROCESSING OF GRIEVANCES WILL ENABLE COURT TO GRANT STAY OF ARBITRATION. The union sought to submit to arbitration certain demands made by it for an amendment to the collective bargaining agreement which provided for arbitrating disputes as to its terms "without the necessity of going through the various grievance steps." The court held that when the company did not agree to this amendment, the respondent's action in instituting arbitration without going through grievance steps was contrary to the terms of the collective bargaining agreement and therefore entitled the company to a stay of the arbitration proceedings. ***John Hancock Mutual Life Ins. Co. v. Insurance Workers Int'l Union, AFL-CIO,*** N.Y.L.J., March 9, 1960, p. 12 (Fine, J.).

COLLECTIVE BARGAINING AGREEMENT PROVIDING THAT DISPUTES "MAY" BE SUBMITTED TO THE GRIEVANCE PROCEDURE MAKES ARBITRATION AN EXCLUSIVE RATHER THAN A PERMISSIVE REMEDY. On a motion to stay proceedings pending arbitration the court found that the word "may" used for the initiation of the grievance procedure (of which the last step was reference to an arbitrator) does not mean that the steps provided for dispute settlement are permissive. On the contrary, "the collective bargaining agreement as a whole manifests an intention by the parties to avoid, if possible, industrial strife by requiring that disputes arising under the contract be referred to arbitration." ***Degan v. Madison Square Garden Corp..,*** N.Y.L.J., March 11, 1960, p. 13 (Nathan, J.).

NEW JERSEY COURT HOLDS THAT COURT PROCEEDINGS MUST BE STAYED PENDING ARBITRATION BEFORE THE INTERNATIONAL EXECUTIVE BOARD OF THE AMERICAN FEDERATION OF MUSICIANS. Reviewing common law arbitration in New Jersey, the court stated that under the arbitration statute of 1923, "it seems clear that there is a mandate upon the court to grant a *stay,* as distinguished from a *dismissal* of the court action, when the arbitration clause is not a condition precedent to resort to the courts." The confusion generated by the language of prior cases where arbitration had not been made a condition precedent to resort to courts, "stems from a failure to recognize that in those cases the court was considering the propriety of a *dismissal* of the court action for failure to arbitrate, rather than a *stay* of the action." ***Shribman v. Miller,*** Superior Court of New Jersey, Chancery Division—Bergen County, C 2187-58, March 3, 1960 (Kilkenny, J.).

IV. THE ARBITRATOR

DISCLOSURE TO PARTIES OF FACTS WHICH MAY DETERMINE THE QUALIFICATION OF AN ARBITRATOR BY THE APPOINTING AGENCY IS IMPERATIVE. Said the court: "When the Association is informed by a prospective arbitrator in response to its inquiry, of circumstances which are 'likely to create a presumption of bias,' nothing less than a prompt communication of such disclosure to the parties, even where the filling of a vacancy is concerned, provides the affected party with an opportunity to challenge 'for cause.' Nor is it sufficient for the Association to take the position that *it* weighed the disclosure and concluded that it did not affect the eligibility of the proposed arbitrator. The party should have the right to argue the matter with the appointing authority before the appointment is effected. The party may well have a sensitivity to the disclosure not realized by the appointing authority, and while in the ultimate its objection may not be justified, it should not be deprived of at least the opportunity to convince the appointing authority of the desirability of selecting a replacement or even a further replacement . . . The failure of the Administrator to communicate to the parties information disclosed by a prospective arbitrator bearing upon circumstances likely to create a presumption of bias, and the consequent prevention of the party to proffer a timely objection based upon that information, is more than a loose procedural informality. It goes to the heart of a body designed to resolve controversy—its integrity. In this instance it fails to protect what might be termed 'due arbitration process'." An award was therefore vacated, and the judgment confirmed. (For another issue in this case, the appealability of the order, see *Arb. J.* 1959, p. 111.) *Rogers, Attorney General of the United States v. Schering Corp.,* U.S. District Court New Jersey, C-1168-52, Forman, C. J., September 22, 1958, affirmed by the Third Circuit Court of Appeals, November 5, 1959 (neither decision yet reported).

FAILURE TO BELIEVE TESTIMONY OF PARTY TO ARBITRATION IS NOT SUFFICIENT GROUND TO VACATE AWARD FOR ARBITRATOR'S IMPARTIALITY. A factual issue was submitted for the arbitrator's determination regarding the circumstances under which the petitioner's employee was discharged. In deciding the issue, the arbitrator rejected the employer's version of an incident. That the arbitrator, as the trier of the facts, chose to disbelieve the petitioner, does not amount to a lack of impartiality such as to set aside the award. *Lee Letter Service v. Amalgamated Lithographers,* N.Y.L.J., June 8, 1959, p. 13 (Spector, J.).

SUFFICIENCY AND TIMELINESS OF THE NOTICE FOR ARBITRATION ARE FOR THE ARBITRATORS TO DECIDE. Said the court: "All actions of the parties subsequent to the making of the contract which raise issues of fact or law, lie exclusively within the jursidiction of the arbitrators." *Taurone Label Co. v. Livingston,* N.Y.L.J., March 23, 1960, p. 12 (Aurelio, J.).

REFUSAL BY ARBITRATORS TO ORDER PRODUCTION OF BOOKS AND RECORDS SPECIFIED IN A PARTY'S SUBPOENA IS INSUFFICIENT REASON TO VACATE AN AWARD. During the course of the proceedings the arbitrators issued a subpoena duces tecum, but later felt that the subpoenaed books and records were not material or relevant, and refused to compel their production. The court said: "It is elementary that mere refusal to receive evidence is not sufficient to vacate; the evidence excluded must be shown to be clearly relevant to the disputed issue." Further: "The arbitrator shall be the judge of the relevancy and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary." *Milliken Woolens v. Weber Knit Sportswear,* 20 Misc. 2d 504 (Matthew M. Levy, J.).

WHETHER ARBITRATION SHOULD BE STAYED PENDING DETERMINATION OF AN ACTION BETWEEN THE PARTIES HELD WITHIN THE DISCRETION OF THE ARBITRATOR. In a dispute concerning sale of corporate stock which initially went to arbitration, certain issues involving salary claims of the respondent were stricken as non-arbitrable, while the question of net worth of the corporation was considered arbitrable. The salary due was then made the subject of a separate action commenced by the petitioner who then claimed that this action should be terminated before the arbitration of the arbitrable issues was heard, since the arbitrators would not be able to make a valid award without knowing the outcome of the court action. The court said that this decision "must in the first instance be left to the discretion of the arbitrators." *Marshall v. Lang,* N.Y.L.J., March 25, 1960, p. 12 (Nathan, J.).

ARBITRATORS MAY GRANT EQUITABLE RELIEF EVEN THOUGH SUCH RELIEF COULD NOT BE GRANTED BY A COURT. The agreement provided that arbitrators shall adjudicate differences "under the rules and regulations of the American Arbitration Society [sic]." Sec. 42 of AAA rules provides for any relief which the arbitrators deem just and equitable. The court, in confirming the award which provided for options to buy stock interests, found that the arbitration clause allowed for submitting any "differences which might arise between the parties in the operation of the business," and that "equitable relief is proper and may be granted by the arbitrators even though such relief would not be proper if the controversies between the parties were being determined by a court rather than by arbitrators." *Astey v. Smith,* 19 Misc. 2d 1059 (Brennan, J.).

DISPUTE STEMMING FROM AN ORIGINAL CONTROVERSY, WHICH THE PARTIES AGREED TO ARBITRATE, SHOULD BE DECIDED BY ARBITRATION. In reversing an order staying arbitration, the court said: "If the dispute were one which had its genesis only in the award, the result might be different." *Koppell v. Davis,* 10 App. Div. 571, 195 N.Y.S. 2d 891 (First Dept.).

V. THE PROCEEDINGS

PARTICIPATION IN ARBITRATION PROCEEDINGS AMOUNTS TO A WAIVER OF THE RIGHT TO HAVE COURT ACTION ON THE ISSUE OF THE VALIDITY OF THE ARBITRATION AGREEMENT. The court said: "Having participated in the arbitration, respondent waived her right to determine the validity of the arbitration contract in this court." *Windsor Anserphone Corp. v. United Telephone Answering & Communication Service Union,* N.Y.L.J., August 24, 1959, p. 3 (Capozzoli, J.).

DEMAND FOR ARBITRATION IS NOT SUFFICIENT TO MAKE IT AN "INITIAL PLEADING" WITHIN THE TERMS OF THE FEDERAL STATUTE FOR DETERMINING TIMELINESS OF PETITION FOR REMOVAL OF CASE TO FEDERAL COURT. The union filed a demand for arbitration over the breach of the collective bargaining agreement and the employer made a motion in New York Supreme Court to stay the arbitration proceedings. The motion was denied and arbitration took place with an award favoring the union. In the union's action to have the award confirmed by the N.Y. Supreme Court, the employer applied for removal to the Federal District Court, which was granted. On an application of the union to remand the case to the state court, the federal court said that the original demand for arbitration did not qualify as an "initial pleading" within the federal statute providing that petition for removal of a civil action from a state to a federal court shall be filed within twenty days after receipt by defendant of the initial pleading. But it did become an initial pleading when the employer moved for a stay of arbitration, and since no petition for removal was filed within twenty days of this date, the case was remanded to the state court. *Minkoff v. Budget Dress Corp.,* 180 F. Supp. 818 (S.D. N.Y., Dimock, J.).

COURT WOULD NOT GRANT INJUNCTION PENDING OUTCOME OF ARBITRATION. A company moved to stay arbitration of disputes concerning its right to close down some of its departments, urging that this involved a right to manage business affairs and was therefore not arbitrable. The union moved to compel arbitration and further to enjoin the company from closing down the departments pending the outcome of the arbitration. The court directed arbitration, finding that there was a sufficient allegation of bad faith to create an issue of fact which an arbitrator could decide. "The court finds that the arbitrator can make the union's employees whole for any harm done them by the discontinuance should the arbitration result in a decision in favor of the respondents. Thus there will not be irreparable harm and no injunction lies." *Great A. & P. Tea Co. v. Crotty,* N.Y.L.J., March 29, 1960, p. 12 (Nathan, J.).

STAY OF ARBITRATION DENIED EVEN THOUGH PARTY MAY BE FACED WITH NEED OF PROCEEDING BEFORE ARBITRATORS WHILE AT THE SAME TIME PROSECUTING AN ACTION FOR RESCISSION OF THE CONTRACT. In arriving at its decision, the court quoted from *Horli Chemical Sales Corp. v. Oliphant,* 68 N.Y.S. 2d 177, where it was said:

"The incongruity of prosecuting in arbitration various claims under a contract, the validity of which is under challenge in a court of law, is inescapable. It is attributable, however, to plaintiff's active assent first to join in arbitration and its subsequent repudiation of that assent by instituting the action to vitiate the contract upon which the arbitration was predicated. Having voluntarily invoked the forums of arbitration and the court, the plaintiff must be deemed to hazard the consequences." *Milton L. Ehrlich, Inc. v. Swiss Construction Corp.*, 197 N.Y.S. 2d 668 (Hofstadter, J.).

ADMISSION OF LIABILITY SUBSEQUENT TO COMMENCEMENT OF ARBTIRATION PROCEEDING DOES NOT JUSTIFY STAYING THE ARBITRATION. Said the court: "Once the arbitration proceeding has been duly commenced, it depends upon the state of matters at the time of the commencement thereof, not what occurred thereafter and, if the circumstances be such, then to invest jurisdiction. The same cannot be ousted by any subsequent event . . . Here it was not until after respondent had commenced arbitration proceedings that petitioner first admitted its liability." *Associated Metals & Minerals Corp. v. Kemikalija,* N.Y.L.J., March 2, 1960, p. 13 (Gavagan, J.).

VI. THE AWARD

ARBITRATION AWARD UPHELD DESPITE CLAIM THAT ARBITRATORS STATED THEIR DECISION MIGHT BE REOPENED AT A LATER DATE IF ADDITIONAL FACTS concerning the under-writing principles in a group plan of professional disability insurance developed. The court held that this statement did not make the award so indefinite as to justify vacating it. The Appellate Division, 8 App. Div. 2d 105, which reversed the Supreme Court ruling that vacated the award, 15 Misc. 2d 102 (digested in *Arb. J.* 1959 p. 217) was therefore affirmed. *Walter R. Kessler v. National Casualty Co.*, 7 N.Y. 2d 909, 197 N.Y.S. 2d 477.

ARBITRATION AWARD MAY NOT BE VACATED ON THE GROUND THAT IT IS ERRONEOUS IN FACT OR IN LAW. The Appellate Division reversed a lower court order granting a motion to vacate an arbitration award, referring, among other cases, to *Spectrum Fabrics Corp. v. Main St. Fashions,* 285 App. Div. 710, 714, aff'd 309 N.Y. 79. *Phillips v. American Casualty Co. of Reading, Pa.*, 10 App. Div. 2d 689, 198 N.Y.S. 2d 538 (First Dept.).

ARBITRATION AWARD DIRECTING SURVIVING STOCKHOLDERS TO PURCHASE DECEDENT'S SHARES OF STOCK UPHELD. Petitioner argued that the award did not determine when the payments for the stock were to begin. The court held that the award providing the stockholders should purchase the shares "pursuant to the provisions therein contained of said agreement," adequately determined when payments for stock were to begin, since the agreement clearly and unambiguously set forth the time and method of payment. *Gillman's Estate v. Bloom,* 21 Misc. 2d 62, 195 N.Y.S. 2d 1021 (Jacob Markowitz, J.).

MATTERS DECIDED IN ARBITRATION PROCEEDINGS ARE RES JUDICATA BETWEEN THE PARTIES. Under a partnership agreement calling for arbitration of dissolution disputes, an award was rendered whereby an amount of more than $200,000 was fixed as plaintiff's share in the liquidation of the partnership. The amount awarded to plaintiff was paid to him. Later, he instituted an action alleging that other partners had diverted funds to a corporation. This action was dismissed since the award was res judicata of all the issues in that action. Said the court: "The award as made and upon which judgment has been entered, finally and completely adjudicated all rights plaintiff had to an accounting." *Gutwirth v. Carewell Trading Corp.*, 20 Misc. 2d 64 (Epstein, J.).

RULE AGAINST SPLITTING A CAUSE OF ACTION APPLIES TO ARBITRATION AWARD. A company obtained an injunction award in arbitration for breach of a restrictive covenant of an employment contract. After judgment had been entered upon the award, the company sought a second arbitration for money damages for the same breach. The court, in dealing with a question of first impression, referred to the general rule that where the merits of a controversy are referred to an arbitrator, his determination is binding and the parties must abide by it. Stating that the law in New York forbids a suit for money damages on the same cause of action for which a party had obtained an injunction in a prior suit, the motion for a permanent stay of arbitration was granted. *Brandt v. Lawson Associates, Inc.*, 196 N.Y.S. 2d 835 (Albany County, Bookstein, J.).

LABOR ARBITRATORS ARE NOT REQUIRED TO MAKE FINDINGS OF FACTS. In referring to *In re Curtis-Castle*, 64 Conn. 501, the court said: "The chief objectives of arbitration procedure—'to avoid the formalities, the delay, the expense and vexation of ordinary litigation' id. p. 511—would be nullified if in each case a disappointed party to an arbitration proceeding was entitled to another trial in court upon the same issues adjudicated by the arbitrators." *Kirschner v. Batter Building Materials Co.*, Superior Ct., New Haven County, Conn., Nov. 17, 1959, No. 90300 (House, J.).

COURT FUNCTION IN SETTING ASIDE OR CONFIRMING AN AWARD IS SEVERELY LIMITED. Said the court: "If it were otherwise, the ostensible purpose for resort to arbitration, i.e. avoidance of litigation, would be frustrated . . . The statutory provisions, 9 U.S. Code §§ 10, 11 in expressly stating certain grounds for either vacating an award or modifying or correcting it, do not authorize its setting aside on the grounds of erroneous finding of fact or of misinterpretation of law." *Amicizia Societa Nav. v. Chilean Nitrate & Iodine Sales Corp.*, 274 F. 2d 805 (2d Cir., Clark, C. J.).

INDIVIDUAL UNION MEMBERS HAVE NO STATUS TO ENABLE THEM TO VACATE AN ARBITRATION AWARD. In reversing the order of the Appellate Division which affirmed the vacatur of an arbitration award (digested in *Arb. J.* 1959 p 47), the Court of Appeals said, in a majority decision: "The award, having been rendered in a controversy between the

parties to a valid collective bargaining agreement, could be vacated only at the initiation of a party to the arbitration . . ." Since the petitioners were not parties to the collective bargaining agreement they "may not avail themselves of rights which under the Civil Practice Act are limited to parties; an exception to such limitation may not be created by judicial applictaion of equitable principles, nor may a basis for vacatur be supplied by implication." In referring to its previous decision in *Parker v. Borock* (digested in *Arb. J.* 1959 p. 38), the court said it was made clear "that an employee could not avail himself of the arbitration procedure provided in the collective bargaining agreement since . . . the contract granted such right only to the union and the employer." *Soto v. Lenscraft Optical Corp.*, 7 N.Y. 2d 397, 198 N.Y.S. 2d 282 (Dye, J.).

ARBITRATION AWARD HELD VALID DESPITE FACT THAT TWO PARTNERS OF PARTY-COMPANY DIED AFTER THE SUBMISSION TO ARBITRATION BUT PRIOR TO THE RENDERING OF THE SUPPLEMENTAL AWARD. The court, in referring to a previous decision in this case (digested in *Arb. J.* 1957 p. 59, 165), confirmed the award in saying that "since respondents' claim for damages did not abate, and since upon the death of [the deceased partner] all rights in this claim became vested in his surviving partners, upon whom also devolved the right to wind up the partnership affairs, substitution of a representative of the estate of the [deceased] would not have been proper." *Florida Molasses Co. v. First National Oil Corp.*, 197 N.Y.S. 2d 774 (Latham, J.).

FLORIDA COURT WILL NOT ENFORCE NEW YORK ARBITRATION AWARD REDUCED TO JUDGMENT WHERE FLORIDA PARTY HAD NOT PARTICIPATED IN THE PROCEEDINGS. The Court viewed participation in the New York arbitration which was held before the new Florida Arbitration Act came into force (October 1, 1957), a necesssary requirement before enforcing any award rendered against a Florida resident. The holding in a prior Florida case, *Pacific Mills v. Hillman Garment* (digested in *Arb. J.* 1956 p. 223), was, said the court, "limited to the circumstances where there was such actual participation and views as dictum the language reciting that the New York Civil Practice Act granted jurisdiction to the Supreme Court of New York to order a judgment upon an arbitration award in those instances where the party to the arbitration proceeding had either voluntarily participated in the proceeding *or after proper notice had failed to participate* [emphasis supplied by the Court]." *American Cocoa Corp. v. Sunshine Food Products Co.*, Civil Court of Record, Dade County, Florida, No. 59-7633, March 15, 1960.

COURTS WILL NOT REVIEW THE ARBITRATOR'S CONSIDERATION OF EVIDENCE. The claim of the applicants, said the court, was "that the Board of Arbitration acted improperly in that it did not consider the facts in evidence, failed to take into consideration certain evidence and claims of the applicants and improperly reached certain conclusions. This, in effect, is an attempt to require this Court to re-examine all the evidence and

substitute its finding and conclusions for those of the Board of Arbitration. This is not the proper function of the Court in such circumstances as this and the Court will not substitute its judgment for that of the arbitrators." A motion to vacate an award was therefore denied. *Kirschner v. Batter Building Materials Co.*, Superior Ct., New Haven County, Conn., Nov. 17, 1959, No. 90300 (House, J.).

AWARD MADE PURSUANT TO NON-RAIDING AGREEMENT BETWEEN UNIONS WAS HELD NOT SPECIFICALLY ENFORCEABLE BY FEDERAL COURT. Distinguishing the *Lincoln Mills* decision, which permitted specific performance of arbitration clauses in collective bargaining agreements, the court said: "It seems nonetheless clear, from the opinion itself, that the court intended in Lincoln Mills to deal solely with collective bargaining contracts." In so holding the court disregarded a prior ruling of the Seventh Circuit which viewed *Lincoln Mills* as laying to rest problems of enforcing arbitration clauses in general. Collective bargaining agreements and non-raiding agreements stand on completely different footings for the purposes of an application of sec. 301 (a) of the Taft-Hartley Act. *Int'l Union of Doll & Toy Workers of United States and Canada, AFL-CIO v. Metal Polishers, Buffers, Platers & Helpers Int'l Union, AFL-CIO,* 180 F. Supp. 280 (D.C. S.D. Cal., Mathes, D. J.).